Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MANUEL AVALOS, JR.,

Petitioner,

-against-

DON HUNTER, in his official capacity as Sheriff of Collier County,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the trial court, in granting judgment as a matter of law after verdict, impermissibly weigh the evidence by requiring petitioner to show, in opposition to the motion, that there was a "substantial conflict" in the evidence, in violation of petitioner's right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution?

2. Did the court of appeals, in affirming the judgment as a matter of law after verdict, impermissibly engage in evaluations of the credibility of witnesses, in violation of petitioner's right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution?

3. Did the trial court, in granting judgment as a matter of law after verdict, fail to draw inferences that a reasonable juror could have drawn in support of petitioner's claim, in violation of petitioner's right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution?

4. Did the trial court, in granting judgment as a matter of law after verdict, permit the respondent to raise new grounds not raised in its previous motion for judgment as a matter of law, in violation of petitioner's right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution?

5. Did the trial court, in granting judgment as a matter of law after verdict, apply a legal standard in evaluating

QUESTIONS PRESENTED – Continued

petitioner's evidence as to white comparators which is in conflict with this Court's precedents?

6. Did the trial court apply a standard for constructive discharge claims which is inconsistent with the better reasoned decisions of the courts of appeals?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit are those in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1-2) is reported at 172 F.3d 881 (11th Cir. 1999) (decision without published opinion), *reh'g en banc denied*, ___ F.3d ___, 1999 U.S. App. LEXIS 17006 (11th Cir. 1999). The opinion of the trial court (App., *infra*, 3-31) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1999. Rehearing *en banc* was denied on April 27, 1999. On June 16, 1999, this Court granted petitioner's application for an extension of time within which to file this Petition for Writ of Certiorari, up to and including August 16, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Civil Rights Act of 1866, 42 U.S.C. § 1981:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 50, Federal Rules of Civil Procedure:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing

in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

As will be demonstrated below, Petitioner Manual Avalos compiled a distinguished record over twelve (12) years as a deputy sheriff in respondent's employ, despite repeated acts of discrimination against him because of his Mexican national origin. Shortly after petitioner complained to his superiors about discrimination in late 1992, respondents seized on petitioner's erroneous service of an expired warrant, and set in motion a chain of events which led to petitioner's constructive discharge on October 29, 1993.

Petitioner filed suit against respondents on June 21, 1995, alleging discrimination because of his national origin and ancestry, and because of a perceived disability. The case was tried to an all white jury on December 9 through 12, 1996, with Magistrate Judge Thomas G. Wilson presiding.

At trial, petitioner introduced evidence as to the facts of his claim as follows:

1. Petitioner began employment with respondent, under the administration of the previous sheriff, as a deputy sheriff in 1981, after serving for two years as a volunteer. He was hired in part because his Spanish speaking skills were in demand.

2. After respondent was elected sheriff in 1987, the department was reorganized, so that Susan Riley was placed in charge of the civil and warrants division, and Kim Cherney was appointed as her subordinate to supervise the service of fugitive warrants. As such, Riley became the head of the division in which petitioner worked, and Cherney became his immediate supervisor.

3. During this time petitioner, who was the only Hispanic warrant officer in respondent's employ, was assigned to work alone in the isolated rural community of Immokalee, while the white warrant officers worked in teams of two in Naples. Petitioner repeatedly expressed concern, with no results, to Riley and Cherney regarding the dangers of serving fugitive warrants alone. Finally, a series of white officers from Naples were assigned to work briefly with petitioner, but were then transferred back to the coast.

4. Cherney and Riley closely monitored and criticized plaintiff for his use of vacation and sick leave, while white officers were regularly permitted to take unscheduled leave without question. One white officer was known to frequently visit his girlfriend while he was on duty, but was not disciplined by respondent.

5. In May of 1989, Riley devised a contest, whereby officers would be awarded a point for each arrest pursuant to a warrant. Riley and Cherney determined, however, that petitioner, the Hispanic officer working alone in Immokalee, would be given only one-half point for each arrest. Despite this handicap, petitioner won the contest, making more arrests than any of the white officers. Riley promptly ended the contest.

6. During this time, petitioner also earned recognition for an extraordinary act of heroism in the line of duty. Rushing to the scene where a small airplane had just crashed, plaintiff pulled a survivor from the burning plane just moments before it was completely consumed by flames. The rescue received national press attention, brought credit to respondent's department, and earned petitioner the Medal of Distinguished Service. Among petitioner's other credits were breaking up a large immigration fraud ring and tracking down an elusive fugitive who was living in Florida under an alias, and was wanted in North Carolina for murder.

7. Petitioner, who was hired for his Spanish speaking ability, had found that speaking Spanish was an effective way to elicit vital information in Immokalee, where the population is as much as 85% Hispanic during the winter vegetable season. Petitioner was disciplined by Cherney for speaking Spanish in his dealings with people in the Immokalee community who, although they spoke some English, were primarily Spanish speaking.

8. In the latter part of 1992, petitioner complained to his superiors, Cherney and Riley, about the discriminatory treatment he was experiencing. When this proved unavailing, petitioner complained to Riley's superior, Chief Gail Addison. Addison informed Riley that petitioner had taken his complaint to her, and Riley responded with a memorandum to respondent, dated December 10, 1992. In the memorandum, Riley requested that petitioner be discharged from his position or, if retained, that he be required to undergo a psychological evaluation to see if he was "salvagable." In sworn deposition testimony, which was read at trial, Riley acknowledged that she had no concerns about petitioner's job performance. After initially denying any knowledge of petitioner's complaint to Addison, Riley admitted the same when confronted with references in her memorandum to the possibility that petitioner might take legal action because of "perceived harassment." This possibility, Riley concluded in her memorandum, demonstrated that petitioner was not a "team player."

9. Riley then ordered Cherney to closely monitor petitioner's use of sick time. She did not order that any other employees' use of sick time be monitored, and only petitioner's was so monitored by Cherney. Cherney and Riley repeatedly summoned petitioner to Riley's office to upbraid him for his use of vacation time, as well as alleged deficiencies in his cellular phone logs.

10. On May 31, 1993, which was the official holiday for Memorial Day, petitioner was assigned to work with

Steven Dest, a white officer who ordinarily worked as a court bailiff. Petitioner and Dest picked up arrest packets to be served on a number of individuals, including Frederick Pray. Petitioner attempted to verify the warrant by calling his superior officer, Kevin Nelson (Cherney had recently been transferred to another position), but no one answered the telephone due to the holiday. Neither petitioner nor Dest attempted to check the validity of the warrant on the computer, which had recently been made available to them for this purpose. Plaintiff and Dest then apprehended Pray without incident or use of force, brought him to the station, processed him, and then released him on his own recognizance, per the terms of the warrant.

11. A few days later Katina Martinez, from the county records office, contacted petitioner and advised him that the warrant on Pray had expired before the arrest, and asked petitioner to write a memorandum to explain the arrest, so that the matter could be removed from the court docket. App. 5. Petitioner submitted the memorandum, in which he stated that he had attempted to contact the warrants division and the records office, but could not reach anyone because of the holiday, verified the warrant with dispatch, and went ahead with the arrest. App. 5.

12. No complaint, civil action, charge or any other protest was ever made by Frederick Pray as a result of his arrest by petitioner and Dest on the expired warrant.

13. On June 3, 1993, Martinez informed Nelson, who is plaintiff's immediate supervisor and who reports directly to Riley, about the arrest. Nelson asked Martinez to provide him with a copy of petitioner's statement. App. 5. Nelson concluded that petitioner was "lying," because the records office was in fact staffed on the date in question. He then obtained the tape of the calls to dispatch, which revealed that plaintiff had in fact called dispatch on May 31 to verify a warrant, but that it was for a suspect other than Frederick Pray.

14. On June 10, 1993, Nelson sent a memo to Riley, reporting his conclusions regarding the Frederick Pray warrant, accusing petitioner of lying to cover up his error, and recommending that petitioner be transferred out of the unit. Riley then requested that the Professional Responsibility Unit, also known as "internal affairs," follow up on the matter as to petitioner only. No such allegation or referral for investigation was made with regard to Dest, the white officer. In reaching these conclusions, and in recommending an internal affairs investigation and a transfer of petitioner, Nelson and Riley at no time spoke to petitioner about the matter, nor made any attempt to obtain from him an explanation of his actions and statements.

15. Nelson did, however, ask Dest, the white officer who participated with petitioner on the Frederick Pray arrest, for his version of the facts. Dest stated with certainty that the call had been made to dispatch regarding Frederick Pray, and that they had proceeded with the understanding that the warrant was valid. There is no evidence that Dest was ever accused of lying, nor disciplined in any way, in connection with the Pray arrest.

16. Per Riley's request, internal affairs conducted an investigation of petitioner, but not of Dest. In the course of that investigation, respondent obtained a sworn statement from petitioner. In this statement, petitioner stated that his original statement that he had attempted to contact Records was mistaken, but reiterated that he had verified the warrant with a dispatcher. He also acknowledged that he and Dest did not check the warrants on the computer, but denied that there was any policy requiring him to do so.

17. During this time, Riley dispatched two officers to find Frederick Pray and advise him that he had been "falsely arrested" and might have a claim against Avalos. In this age of litigation, it is remarkable that an official of the sheriff's department would encourage a potential

claimant to sue an officer of the agency. By contrast, when a white officer, Todd Taylor, broke into a woman's house with a warrant for her boyfriend, respondents made no effort to so inform that citizen. In fact Cherney made efforts to convince the citizen *not* to pursue her complaint. Another Caucasian deputy, J.J. Carroll, was sued for the false arrest of Grady Pruette. Carroll's "discipline" for this incident was to read the statute concerning "disorderly conduct," which took him all of 15 minutes. Mr. Pruette was falsely charged with disorderly conduct, a charge of which he was wholly exonerated. Mr. Pruette had suffered from chest pains during the arrest by Carroll. Respondent had to pay Mr. Pruette in excess of $37,000 for the false arrest and excessive use of force perpetrated by Carroll.

18. At respondent's request, petitioner submitted to questioning under oath by internal affairs on August 25, 1993. When asked why he stated in his original note to Ms. Martinez that he had attempted to contact records, petitioner stated that, under the pressure of explaining the arrest, he had mistakenly said he had attempted to contact the records office. He acknowledged that his earlier statement had been "an error, my mistake . . . " App. 8. With regard to his previous statement that he had called dispatch, petitioner expressed surprise at the report that the tapes contained only a call from him on another suspect, and reiterated his recollection that he had called about Pray, but conceded that he could possibly be mistaken. *Id.*

19. On October 7, 1993, Riley met with petitioner and Nelson and informed petitioner that he had violated department rules and would be transferred from the plain clothes warrants bureau to the uniform patrol division, suspended for five days without pay, given a letter of reprimand for insubordination and dereliction of duties, referred to a psychiatrist for evaluation of his fitness, and placed on six months' probation. App. 10.

Believing that the punishment was grossly disproportionate to his behavior in making a good faith arrest, and to discipline given to other officers, petitioner was humiliated to the point where he stated to Riley and Nelson that he would resign rather than accept this punishment. Nelson attempted to convince petitioner to stay; Riley did not. App. 10.

20. So distraught was the petitioner that he attempted to speak personally with respondent, Sheriff Hunter, in order to explain himself. Although the sheriff maintained an "open door" policy respecting his employees and had recently agreed to meet with a white officer to discuss a discipline issue, he refused to meet with the petitioner. The trial court excluded testimony concerning a white officer, Kenneth Martindale, who in a cowardly fashion observed a sexual battery in progress, but failed to render aid to the victim or arrest the rapist. Remarkably, deputy Martindale was not disciplined by respondent, but was nevertheless provided an audience with respondent to explain his less than courageous conduct. Martindale has since been promoted by respondent to preside over the sheriff's substation located in Immokalee.

21. As a result of this final indignity, petitioner submitted his letter of resignation on October 29, 1993. App. 11.

At the conclusion of the evidence, the jury returned a verdict for petitioner on his claim of national origin and ancestry discrimination, and awarded damages of $320,000, including $120,000 in lost earnings and benefits, $100,000 in future lost earnings and benefits, and $100,000 for pain and suffering.

Respondent then moved for judgment as a matter of law, pursuant to F.R.Civ.P. 50 and, after briefing and argument, the Magistrate ruled that there was no basis on which the jury could reasonably have found for petitioner, and entered judgment for the respondent. App. 30.

The Magistrate's Order granting judgment notwithstanding the verdict consists of thirty-one (31) pages of

detailed parsing of the evidence adduced by both sides at trial. At several points in the analysis, the Magistrate demonstrated that he did not find the petitioner to be a credible witness. Included in the Order are the following determinations that particular assertions by the petitioner are not credible:

- The Magistrate concluded that petitioner's statement, nearly three (3) months after the incident, that he was feeling pressure from the investigation on June 3, 1993, was "not true" because plaintiff referred to Nelson as a source of the pressure, and Nelson allegedly did not become involved until later that day. App. 8.
- The Magistrate concluded that plaintiff's statement that he contacted dispatch regarding Frederick Pray's warrant, was "certainly not true." App. 16.
- The Magistrate set out "additional instances of [petitioner's] untruthfulness," with regard to training and instructions he received on the computer. App. 17.
- The Magistrate found that petitioner "lied in his sworn statement," again concluding that petitioner's statement that he was feeling pressure from the inquiry about the bad arrest cannot be true because it incorrectly refers to Nelson as a source of the pressure at that particular moment. *Id.*
- Going to the crux of its determination on the Rule 50 motion, the Magistrate summarized as follows (emphasis added):

> . . . a reasonable juror would be compelled to find that the plaintiff **lied in his statement to the court clerk** about calling the Records section, and **lied in his sworn statements** concerning (1) the lack of any direction from his supervisor to check the computer and (2) that pressure from Nelson caused him to falsify the statement to the clerk. The only **intentional falsehood** that is even arguable is the plaintiff's statement that he had called

a dispatcher and was told that Pray's warrant was active. App. 19.

- So deeply did the Magistrate distrust the petitioner that he observed that, "[i]n my view, the Sheriff would have been fully justified in terminating the plaintiff for these infractions." App. 20 (footnote omitted).
- In another finding based on his judgment that petitioner is not trustworthy, the Magistrate concluded that although petitioner filed a written report, as requested, with the records section of the sheriff's office, he nevertheless "attempted to hide the matter [of the bad warrant] from his supervisor," because he did not specifically inform Nelson. App. 24.
- From circumstantial evidence as to what was known by whom at what time, the Magistrate also concluded that petitioner was guilty of "submission of a false statement and lying under oath." App. 28.
- The Magistrate again relied on his adverse determination as to petitioner's credibility, and discredited petitioner's testimony regarding Riley's motivation and involvement, concluding that "Riley did not play the prominent role in the plaintiff's discipline that the plaintiff portrays." App. 26.
- In an extraordinary conclusion, the Magistrate observed that the jury's award "reveals the extent to which it was misled in this case." App. 28.

In addition to making credibility determinations, the Magistrate also made in a number of inferences adverse to petitioner's claims. In the context of a Rule 50 motion the above inferences, when used as a basis for granting the motion, amount to a judicial finding that they are the only possible inferences from the information presented. Although some of the Magistrate's inferences may have been reasonable or possible ones, based on the facts adduced, they were not the only inferences that a reasonable jury could have made from those facts, to wit:

- The Magistrate examined the evidence regarding the arrest warrant contest, in which Riley awarded one

point to the white officers, and one-half point to petitioner for each arrest. He drew the inference that Riley's contest rules were intended to favor Naples officers over the only Immokalee officer, and not to discriminate against petitioner. App. 25. There is absolutely no evidence in the record to support this outlandish conclusion by the magistrate.

- Also with regard to the contest, the magistrate inferred from the fact that plaintiff outperformed the other officers that the contest "does not seem to have been unfair." App. 25. Again, this is akin to saying that where a Hispanic has to work twice as hard for the same pay as a Caucasian, because the pay balances out, there is no discrimination.
- In concluding that Riley did not play an active role in plaintiff's investigation and discipline, the Magistrate inferred that Riley "would seemingly be compelled to ask for an internal affairs investigation upon receiving [Nelson's] memorandum." App. 26. Not only is this inference without evidentiary basis, but it ignores evidence that Riley and Cherney actively sought to discourage the investigation of a white officer, Todd Taylor, who had also been accused of misuse of a warrant to break into the house of a woman not the subject of a warrant.
- In reviewing Riley's 1992 memorandum in which she reacted to petitioner's complaint of harassment by recommending his dismissal or psychiatric evaluation, even though she had no concerns about his work performance, and Riley and Cherney's subsequent scrutiny of petitioner's work habits, the Magistrate concluded that this "does not constitute evidence that [Riley] was biased against the plaintiff due to his Mexican ancestry." App. 27.

The court of appeals, in a one-paragraph, unpublished opinion, affirmed the Order of the Magistrate. *Avalos v. Hunter*, 172 F.3d 881 (11th Cir. 1999).

REASONS FOR GRANTING THE PETITION

This petition for certiorari arises from an extraordinary judicial usurpation of the role reserved to the jury by the Seventh Amendment to the Constitution. The magistrate's extensive weighing of the facts, and his substitution of his judgment over that of the jury on matters of credibility, negated four days of jury attention and deliberation, as well as a substantial verdict for petitioner on his discrimination claims. This case presents an opportunity for the Court to give clear guidance to the lower courts as to the very circumscribed nature of their review of jury verdicts in employment discrimination and other civil trials.

As to the Constitutional prohibition on weighing the evidence in determining a Rule 50 motion, this case presents the opportunity to resolve a conflict among the circuit courts as to the occasions when it may be proper to consider evidence adverse to the non-moving party, and to clarify decisions of this Court which have not been uniformly followed by the courts of appeals.

As to the rare circumstances in which it is appropriate to consider issues involving credibility of witnesses in connection with a Rule 50 motion, this case also presents an opportunity to resolve a conflict among the circuit courts.

As to the requirement that a court give the benefit of all reasonable inferences which may be drawn from the evidence to the non-moving party on a Rule 50 motion, this case also presents an opportunity to resolve a conflict among the circuit courts.

Finally, this case presents an opportunity to resolve a conflict among the circuit courts as to the elements of a showing of "constructive discharge" in an employment discrimination case.

I. THE LOWER COURT'S HOLDING THAT PETITIONER HAS THE BURDEN OF SHOWING A "SUBSTANTIAL CONFLICT" IN THE EVIDENCE, IN OPPOSITION TO A MOTION FOR JUDGMENT AS A MATTER OF LAW, CONFLICTS WITH PRECEDENTS OF THIS COURT

In granting the respondent's motion for judgment as a matter of law, the Magistrate imposed on the petitioner the burden of demonstrating that there was a "substantial conflict in the evidence to support a jury question." App. 13. The full statement of the standard applied by the Magistrate, as quoted in his Order from the case of *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996), is as follows:

> The nonmoving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law; "there must be a substantial conflict in evidence to support a jury question."

App. 13 (citations omitted). This standard is in conflict with the approach taken by this Court and by several other circuit courts. Moreover, *Isenberg* has been expressly disapproved of by the Eleventh Circuit Court of Appeals in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

The crux of the matter is the proscription against weighing the evidence, which is the proper and exclusive province of the jury. 9A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2524. To the extent that it requires the court to examine not just the non-moving party's evidence but, in addition, the evidence of the moving party, in order to determine if the evidence is substantial, this rule "comes dangerously close to a judicial weighing of the evidence." *Id.* (footnote omitted).

The proper rule, according to prior decisions of this Court, is that only the evidence in support of the non-moving party's claim be examined in determining a Rule 50 motion. If the non-moving party has put on evidence from which a jury could reasonably find for her, then that is the end of the inquiry. *Berry v. United States*, 312 U.S. 450, 456 (1941). This rule is followed by some, but not all of the circuit court of appeals. *Compare, CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, 46 F.3d 1211, 1214 (1st Cir. 1995) (only evidence of non-moving party is considered), and *Jiffy Markets, Inc. v. Vogel*, 340 F.2d 495, 498 (8th Cir. 1965) (same, applying state law), with *Boeing Co. v. Shipman*, 411 F.2d 365, 375 n.16 (5th Cir. 1969) (*Berry* case limited to its facts and circumstances).

Where lower courts have not followed this Court's holding in *Berry, supra*, and subsequent cases, it has sometimes been held that *Berry* is limited to federal statutory negligence claims, and is not generally applicable, despite the general language of its holding. *See, e.g., Boeing Co. v. Shipman, supra*. This case presents an opportunity for the Court to reaffirm the holding of *Berry* and its progeny, and confirm that the rule articulated therein applies generally to Rule 50 motions and Seventh Amendment jurisprudence. Although the *Berry* rule may appear to some to be a rigid one, such rules are particularly appropriate where, as here, they have been crafted to ensure protection of important Constitutional rights such as the right to a trial by jury.

Even if this Court concludes that the *Berry* standard does not apply in Rule 50 litigation generally, it may still fashion a general rule that does not intrude on the jury function in the way that the "substantial evidence" test does. In an attempt to strike a balance between Berry's refusal to look at adverse evidence, and the unrestricted weighing of evidence which can occur in the absence of

such a strict rule, some commentators have suggested a standard which is summarized as follows:

> The correct rule seems to be that the district court may consider all of the evidence favorable to the position of the party opposing the motion for judgment as a matter of law as well as any unfavorable evidence that the jury is required to believe. Thus the trial judge may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. But statements that all of the evidence is to be considered are too broad. Unfavorable evidence that contradicts the favorable evidence must be disregarded as must evidence that is admitted for a limited purpose, such as impeachment.

9A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2529, *citing* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 948-953 (1971).

Even under this more lenient standard, the decision of the Magistrate in the case at bar must fall. In granting the respondent's motion for judgment as a matter of law, the Magistrate weighed volumes of the evidence submitted by respondent, including impeachment evidence, as set out in the Statement of the Case, *supra*. In fact, by petitioner's count, the Magistrate cited to respondent's trial exhibits a total of sixteen (16) times in his Order, while citing to petitioner's exhibits only five (5) times, at least two of which were to discredit such petitioner exhibits.

Arguably, under the rule established by this Court in *Berry, supra,* **any** reference to the moving party's trial exhibits would be suspect. In our case, the extraordinary disproportion in references is truly striking. Under any conceivable standard, this kind of judicial weighing of the evidence, placing particular emphasis on the moving

party's evidence, must be reversed. To do otherwise permits courts to intrude on a jury's function – and to deny a party's Seventh Amendment right to a jury trial.

II. THE LOWER COURT MADE CREDIBILITY DETERMINATIONS WHICH ARE IMPERMISSIBLE UNDER THE STANDARDS FOLLOWED BY MOST COURTS OF APPEALS

The Magistrate correctly observed that petitioner focused a major portion of his case on Susan Riley, the head of his department and the person who informed him of his demotion and other discipline. App. 25. Petitioner introduced testimonial and other evidence that Riley (1) left petitioner to serve fugitive warrants alone in Immokalee, while white officers in Naples had partners, *see* Statement of the Case, *supra*, paragraph number 3; (2) scrutinized his use of vacation and sick leave, while not scrutinizing that of white officers, despite their abuses, *id.* at paragraph 4; (3) held a contest in which the white officers got 1 point for each arrest, and petitioner got one-half point, *id.* at paragraph 5; (4) through her subordinate, Cherney, disciplined petitioner for speaking Spanish to Immokalee residents, even though it helped him obtain information that was helpful in his work, *id.* at paragraph 7; (5) took no positive action when petitioner complained about harassment, but instead, when petitioner complained to her superior, made a written recommendation that petitioner be discharged, or alternatively subjected to a psychological evaluation, to determine whether he was "salvagable," although she had no concerns about his work performance, *id.* at paragraph 8; (6) referred the matter of petitioner's bad arrest of Pray to internal affairs, when she did not refer the bad arrest by a white employee to internal affairs, *id.* at paragraphs 14-15, 17; (7) sent two officers to inform Pray that petitioner had

illegally arrested him, as compared with her and Cherney's response of attempting to dissuade a citizen from pressing a complaint when a white officer made a bad arrest, *id.* at paragraph 17; and (8) personally and officially informed petitioner of the discipline that is the subject of this litigation to petitioner, in a meeting with petitioner and Nelson, *id.* at paragraph 19.

In ruling on respondent's Rule 50 motion, the Magistrate rejected this mass of evidence, claiming he disbelieved the petitioner, thereby usurping a jury's primary function of determining questions of credibility. *U.S. v. Gaudin*, 515 U.S. 506 (1995) (even when an arguably "legal" issue is mixed with a factual issue, the Seventh Amendment compels a jury to make the determination).

Indeed, as indicated in the Statement of the Case, the overriding reason for the Magistrate's ruling which is on appeal here is that he did not find the petitioner credible. Had this been a bench trial, the Magistrate's numerous adverse findings as to petitioner's credibility might be sustainable although some are plainly fanciful, as set forth above. However, such "findings" have no place in a jury case.

It is hornbook law that a court may not indulge in credibility determinations in ruling on a motion for judgment as a matter of law. 9A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2524. Even where the plaintiff's story seems incredible to the court, where the evidence presents questions of fact and credibility for the jury, the court may not grant a Rule 50 motion. *Hirsch v. Archer-Daniels-Midland Co.*, 288 F.2d 685, 685-86 (2d Cir. 1961), *cert. den. sub nom; Hirsch v. Archer-Daniels-Midland Co.*, 371 U.S. 845 (1962); *Thieman v. Johnson*, 257 F.2d 129, 130 (8th Cir. 1958).

There is, however, a conflict among the circuit courts as to one issue: whether courts may grant a Rule 50 motion based on "clearly incredible" testimony. Some courts are comfortable with this approach. *See Anderson v.*

Hudspeth Pine, Inc., 299 F.2d 874, 876 (10th Cir. 1962). Others have limited consideration of credibility to two specific circumstances; (1) where testimony is inconsistent with incontrovertible physical facts, *O'Connor v. Pennsylvania Railroad Co.*, 308 F.2d 911, 915 (2d Cir. 1962) (testimony that plaintiff was injured because defendant failed to clear ice several days after snow storm cannot be believed when contrary to clear weather bureau records of two-day snow storm immediately prior to injury), and where opposing testimony is uncontradicted, unimpeached and comes from a disinterested witness. *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (unimpeached, uncontradicted expert witness).

Under a broad rule that the court can discredit any testimony that is, in its view, "clearly incredible," and take the case away from the jury, much mischief can be done, and the Seventh Amendment eviscerated, as was done in the case at bar. These harms can be avoided by limiting the court's opportunity in a Rule 50 decision to judge credibility to the two narrow circumstances described above. This case affords an opportunity for this Court to resolve the current conflict among the circuits and announce this latter construction of Rule 50 as the law of the land.

III. THE LOWER COURT FAILED TO GIVE PETITIONER THE BENEFIT OF ALL REASONABLE INFERENCES WHICH MAY BE DRAWN FROM THE EVIDENCE

Contrary to the dictates of prior decisions of this Court, the Magistrate failed to give petitioner the benefit of all reasonable inferences which might be made from the evidence adduced at trial, and instead substituted his judgment for that of the jury.

In the petitioner's Statement of the Case, *supra*, he has listed several inferences which the Magistrate drew in

support of respondent, and relied upon as bases for his granting of the motion for judgment as a matter of law. Among them was the inference that Riley's rules for the warrant contest, giving petitioner one-half point and the white officers one whole point for each arrest, were not intended to discriminate against petitioner, but only to assist the other officers. App. 25. The Magistrate further inferred that petitioner's success in the contest proved that it was fair. *Id.* Such inferences may have been possible ones from the evidence at hand, but they were certainly not the only possible ones. One hopes that it is too late in the day to argue that members of protected classes, by working extra hard to out-perform other workers, negate the very civil rights laws that were intended to level the playing field.

Other inferences made by the Magistrate, such as the conclusion that Riley "would seemingly be compelled to" refer plaintiff's bad arrest to internal affairs, App. 26, and that Riley's reaction to petitioner's complaint of harassment was to brand him as not being a "team player" and recommend his dismissal or referral for a psychological evaluation, are subject to the same infirmities. Similarly, the jury could reasonably have inferred that Riley's assigning two officers to go and find Frederick Pray and inform him that petitioner had improperly arrested him was an unusual and suspect practice, particularly when the opposite approach had been taken when a white officer made a bad arrest.

The prior decisions of this Court require that great latitude be given to the jury to draw inferences, and that the possibility of any reasonable inference in support of the petitioner, including several based on some degree of speculation, precludes judgment as a matter of law. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962); *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). The courts of appeals have applied these precedents with vigor. *See Chapman v. AI Transport*, ___ F.3d ___, 1999 WL

493457 (11th Cir. July 13, 1999). Thus, it is well established that even where there is no conflict in the evidence, or the moving party's evidence is uncontradicted, judgment as a matter of law is still improper if conflicting inferences may be drawn from that evidence. *Federal Insurance Co. v. Summers*, 403 F.2d 971, 976 (1st Cir. 1968).

Where, as here, the court has "either overlooked or interpreted into insignificance" evidence for the petitioner, a judgment as a matter of law cannot stand. *Continental Ore Co., supra*, 370 U.S. at 700.

IV. THE LOWER COURT IMPERMISSIBLY ALLOWED RESPONDENT TO ADD NEW GROUNDS TO ITS POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW

At the conclusion of petitioner's evidence, respondent moved for judgment as a matter of law on the following grounds on the national origin claim: (1) petitioner failed to state a prima facie case; (2) there was no evidence to show that petitioner was subjected to differential treatment because he is Mexican-American; (3) respondent articulated, and petitioner admitted to facts to establish a legitimate, nondiscriminatory reason for respondent's actions; (4) petitioner failed to show pretext; (5) there is no evidence of discriminatory intent; (6) there is no evidence of pervasiveness to support a hostile work environment, and that allegation was not included in the EEOC charge and is untimely; and (7) there is no evidence of intolerable working conditions to support the claim of constructive discharge. App. 36-41. The Magistrate denied respondent's motion. In making his oral motion, the respondent failed to identify any testimony, facts or other evidence which was alleged to be insufficient to support petitioner's claims in accordance with Rule 50 requirements. At the close of all the evidence,

respondent renewed his motion, without elaboration, and the Magistrate then reserved ruling on it.

After the jury returned its verdict for the petitioner on December 12, 1996, respondent again orally renewed his motion in summary form. At the Magistrate's direction, written submissions were made. On December 26, respondent filed written motions for new trial and for judgment as a matter of law, notwithstanding the jury's verdict. In the renewed motion, respondent explained the grounds which he had summarily stated in his oral motion, and then impermissibly added new grounds for setting aside the jury's verdict. Specifically, respondent advanced for the first time as grounds for the Rule 50 motion (1) that even if he subjected the petitioner to disparate treatment, he is not liable for the discriminatory discipline because such discipline would have been justified by petitioner's conduct, and irrespective of his national origin, citing *Harris v. Shelby County Board of Education*, 99 F.3d 1078 (11th Cir. 1996); and (2) there was insufficient evidence to support the award of damages. *See* App. 63.

Thus the respondent did introduce new grounds which had not been raised in its Rule 50 motions made during trial. It is generally held that the introduction of such new grounds, after the trial has concluded and the verdict is in, is impermissible. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286 (11th Cir. 1998) (unless grounds for Rule 50(a) and Rule 50(b) motion are "closely related," court will reverse order setting aside jury verdict); 9A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2537, and cases cited therein at n.11. It is also held that the original motion must be specific enough to allow the non-moving party to correct any deficiencies in proof while the record is still open, and to preclude assertion of a new ground in a post-verdict motion. *Id.; Holmes v. U.S.*, 85 F.3d 956, 962 (2d Cir. 1996).

This violation was compounded by the magistrate's reliance on this and other previously unasserted grounds in granting the post-verdict Rule 50 motion. In his Order granting respondent's motion, the magistrate introduced an issue never raised by the respondent: whether the respondent "honestly believed" that petitioner had committed the infractions with which respondent charged him and, after canvassing the evidence, concluded that he did. App. 17. While much evidence was adduced as to whether petitioner did in fact commit the infractions alleged, and whether similarly situated white employees were disciplined as petitioner was for substantially similar (or much more egregious) conduct, the issue of whether the sheriff "honestly believed" that petitioner had committed these infractions was unaddressed and was largely irrelevant since this is a disparate discipline case. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (in disparate discipline cases, even if the plaintiff committed a rule infraction, the critical question is whether the rules are, or are not, uniformly enforced by the employer). Had this issue been raised in the Rule 50 motion at the conclusion of petitioner's case in chief, it could have been addressed at that time. The jury was instructed on this issue and, based on their unanimous verdict, must have found that white officers received more lenient treatment than petitioner.

V. THE LOWER COURT FAILED TO CONSIDER RELEVANT EVIDENCE OF THE TREATMENT OF SIMILARLY SITUATED WHITE OFFICERS, IN CONTRAVENTION OF PRECEDENT ESTABLISHED BY THIS COURT

In *McDonald v. Santa Fe Trail Transportation Co*, 427 U.S. 273 (1976), a case involving a claim of racial discrimination by two white employees who were discharged for alleged criminal conduct, this Court set out the standard

for identifying non-protected employees whose work performance and treatment by the employer were relevant to the ultimate determination of discrimination. Simply stated, the claimant must show that non-protected employees were treated differently than the claimant, even though they engaged in misconduct of "comparable seriousness." 427 U.S. 273, 283. In applying this test, courts should not, however, require "precise equivalence in culpability between employees." *Id.*, n.11.

The application of this standard has spawned volumes of litigation in the lower federal courts. *See* Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW (3rd Ed. 1996) at 330-34. Despite this Court's admonition that "precise equivalence" is not required, some courts have required a rather precise showing that the comparator employees have been subject to the same supervisor, under the same rules, and have engaged in the same conduct. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992). Not only are there varying standards between different circuit courts, but within circuits. For example, one line of cases from the Eleventh Circuit follows this "precise equivalence" standard by requiring the plaintiff and the comparator to be "nearly identical" in all significant respects. *See, e.g., Jones v. Bessemer*, 137 F.3d 1306 (11th Cir. 1998), *rev'd on other grounds*, 151 F.3d 1321 (11th Cir. 1998). Other panels within the Eleventh Circuit have taken a much more lenient view of "similarly situated" by holding that the focus should simply be on (1) the nature of the offenses committed and (2) the nature of the punishments imposed," *Jones v. Gerwens*, 874 F.2d 1534, 1539-40 (11th Cir. 1989), or on whether the employees are subject to the same policies of the employer, *Lathem v. Dep't of Children and Family Svcs.*, 172 F.3d 786 (11th Cir. 1999). These lines of cases present fundamentally different approaches to this problem, with the latter cases, petitioner submits, following a course which is more consistent with this Court's direction in *McDonald, supra.*

This case presents an opportunity for this Court to resolve this conflict among the circuit courts.

The decision of the Magistrate in the case at bar illustrates the lamentable consequences of overzealous insistence on "precise equivalence" of the comparators. Having himself concluded that petitioner lied about the Pray arrest, the Magistrate ruled that two white officers, Todd Taylor and J.J. Carroll, who violated particular citizens' rights during arrests/searches but were not subjected to any significant discipline, could not be used as comparators, because their incidents did not involve a "finding of untruthfulness." App. 22. When petitioner had sought to introduce evidence as to white officers who had lied to respondent but were not disciplined, the Magistrate excluded one (Officer Martindale's false report of his actions during a rape in progress) from admission in evidence, and disregarded the other two (Officer Dest's statement that petitioner verified Pray's arrest warrant, before he and petitioner executed it, and Officer Tritt's falsification of his timesheets).

This kind of parsing of the evidence, resulting in allowing the employer to tailor the record by not making "findings" of untruthfulness when white employees lie about their actions, is problematic in a bench trial, but borders on unconstitutional in a jury trial, where the court is not the trier of fact, and the issue is one largely of fact. *Chaney v. Southern Railway Co.*, 847 F.2d 718, 724 (11th Cir. 1988).

VI. THE LOWER COURT'S RULING NEGATES A PERMISSIBLE JURY FINDING THAT PETITIONER WAS CONSTRUCTIVELY DISCHARGED FROM HIS JOB AS A PLAIN CLOTHES OFFICER

Petitioner resigned his position when he was informed by Riley of the discipline to be carried out against him, and after the respondent rebuffed petitioner's request for a personal meeting. The announced discipline included transfer from plain clothes officer to uniformed road patrol (an entry level position), a five-day suspension, a mandatory psychological evaluation, and a return to probationary status. Statement of the Case, *supra*, paragraph number 19. In the context of the pattern of harassment, scrutiny and unequal treatment that he had suffered from respondent, and of the disproportionate nature of the punishment compared with that given to white officers, the petitioner concluded that his position with respondent had been completely undermined, and that he had no alternative but to resign, particularly since he attempted to speak to respondent, who had an "open door policy." Respondent refused to speak to petitioner about the discipline, while permitting Martindale, the deputy who failed to arrest a suspect he witnessed commit a rape, the right to explain his actions.

In overriding the jury's verdict, the Magistrate dismissed any possibility that returning petitioner to road duty amounted to a constructive discharge with the reasoning that, "[i]f the conditions in the Fugitive Warrants Bureau were so intolerable, why would he object to a transfer?" App. 28. With all due respect, this logic rings as hollow as asking a victim of housing discrimination why she would seek to live where she is not wanted. It well illustrates the wisdom of consigning these determinations to the jury.

The standard for establishing a constructive discharge is an objective one, in which the fact finder is to infer from evidence, often circumstantial, that "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3rd Cir. 1992) (citations omitted); *compare, Buckley v. Hospital Corp. of America*, 758 F.2d 1525, 1530 (11th Cir. 1985). This conflict among the circuits presents itself in the case at bar for possible resolution. Even the Eleventh Circuit has recognized in *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697 (11th Cir. 1998), and *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846 (11th Cir. 1997), that an involuntary transfer may be sufficient to establish a constructive discharge claim.

As with other inferences from the evidence, there are often several different, even conflicting inferences which can be made from one set of facts. Any one of these inferences which is reasonable is a permissible one for the jury to make. The inference here of constructive discharge was well within the province of this jury to make, particularly under the standard articulated in *Gray, supra.* Determination of what a reasonable person would do when confronted with blatant discrimination on the job is particularly appropriate for the jury. While this magistrate may have come to a different conclusion if he were the trier of fact, petitioner requested, as is his right under the constitution, to have a jury resolve the issue. The magistrate's usurpation of the jury function abrogates an important constitutional right which this Honorable Court must not permit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2920
Non-Argument Calendar
(Filed Feb. 12, 1999)

D.C. Docket No. 95-206-CIV-FTM-23

MANUEL AVALOS, JR.,

Plaintiff-Appellant-
Cross-Appellee,

versus

DON HUNTER, Sheriff,
Collier County,

Defendant-Appellee-
Cross-Appellant,

RICCARDO B. RIVAS, Ph.D.,
GRADY PRUETTE,

Movants.

No. 97-3398
Non-Argument Calendar

Docket No. 95-206-CIV-FTM-23

MANUEL AVALOS, JR.,

Plaintiff-Appellant,

versus

DON HUNTER, Sheriff, Collier County,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(February 12, 1999)

Before ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

After a careful review of the briefs and the record, we agree with the court below that plaintiff-appellant failed to present to the jury sufficient evidence to support the jury's verdict. Accordingly, the judgment notwithstanding the verdict entered by the court below is AFFIRMED.[1]

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[1] In light of our disposition of the appeal, appellee's cross-appeal is moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

MANUEL AVALOS, JR., Plaintiff, v. DON HUNTER, etc., Defendant.	CASE No. 95-206-CIV-FtM-23(D) Appeal deadline 7/30/97 Warning 7/15/97

ORDER

In this case, the jury awarded damages to the plaintiff Manuel Avalos, Jr., based upon a finding that the defendant Don Hunter, the Sheriff of Collier County, had discriminated against the plaintiff on the basis of his Mexican ancestry. Following the trial, the defendant filed a Motion for Judgment As A Matter of Law (Doc. 162) and a Motion for New Trial (Doc. 161). Because the plaintiff failed to adduce sufficient evidence from which the jury could reasonably find that the plaintiff was a victim of discrimination, the defendant's Motion for Judgment As A Matter of Law will be granted.

I.

The plaintiff is a United States citizen of Mexican ancestry and speaks both English and Spanish. In 1981, he became employed as a deputy sheriff in Collier County and was assigned to the road patrol. After first being transferred to serving civil process, about 1989 he was assigned to fugitive warrants. Although the main

office for the Fugitive Warrants Bureau was in Naples, the plaintiff operated primarily in the Immokalee area, where he resided.

In April 1993, Sgt. (now Lt.) Kevin Nelson became the supervisor of the Warrants Bureau. Shortly after he assumed that position, Nelson met with the plaintiff and another deputy, Rene Figueroa. They told Nelson they needed a computer in Immokalee in order to check the status of the arrest warrants they were to execute. Nelson agreed, and by mid-May 1993, provided them with access to a computer and with computer training. Nelson instructed the plaintiff and Figueroa to use the computer to determine that a warrant was still active before they went out to arrest an individual.

On May 31, 1993 (the date Memorial Day was observed that year), the plaintiff arrested Frederick Pray on a warrant charging probation violation. At the time, Pray apparently protested that his probation had previously been terminated. Nevertheless, because he could not produce documentation of that, the plaintiff arrested him. In fact, the warrant had been voided four days earlier on May 27, 1993. The plaintiff subsequently admitted that he had failed to check the status of the warrant on the computer before he arrested Pray. Pray's stay at the jail was brief, however, since the bond on the warrant was release [sic] on recognizance.

About a day or two later, the plaintiff received a call from Katina Martinez, a Records supervisor, advising him that the warrant for Pray's arrest was invalid. As a consequence, the matter had to be cleared up in order to negate a court date. The plaintiff therefore wrote a statement for

the Collier County Clerk's Office explaining the circumstances of the arrest. In the statement, the plaintiff said (*see* Def. Ex. 3[1]) (emphasis in original):

> *This deputy attempt[ed] to contact Warrants Div. Also Records to* confirm active warrant with no results (Holiday) No one in. *Dispatch verified active*, so subject was arrested on said charges.

The plaintiff did not advise Nelson, his supervisor, of the bad arrest. However, on June 3, 1993, four days after the arrest, Katina Martinez called Nelson and informed him of the circumstances. Nelson asked Martinez to send him a copy of the plaintiff's statement.

Nelson initially thought that a dispatcher in Communications had erred. However, after reading the plaintiff's statement, Nelson concluded that the Sheriff's Office was faced "with a deputy that was obviously lying in an attempt to cover a mistake" (Def. Ex. 3). Nelson apparently was aware that three people were working in Records and that, if the plaintiff had attempted to contact that office, his call would have been answered, contrary to his statement.

Nelson, as a result, examined the tape of the calls to the dispatchers in Communications. That tape reflected that the plaintiff had telephoned Communications about a different individual, and that, a little later, he radioed that he was taking Pray to jail. The tape, in contradiction of the plaintiff's statement, did not include any request

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[1] Defendant's Exhibit 3 is plaintiff's internal affairs file. It contains a number of documents, but, unfortunately, is not consecutively paginated.

by the plaintiff for a verification of the warrant on Pray, and did not contain any response that the warrant was active.

Nelson, consequently, on June 10, 1993, sent a memorandum to Susan Riley, his superior, relating the circumstances surrounding Pray's arrest and the plaintiff's subsequent actions. The memo stated (Def. Ex. 3):

> [The plaintiff] has shown a complete disregard for supervision by not notifying his supervisor immediately when he became aware of a possible false arrest situation. By choosing instead to make a poor attempt to cover up his mistake and place the agency and his supervisors in a very libelous *[sic]* situation, he has violated numerous General Orders.
>
> My recommendation to you is that Avalos be transferred from his current, high liability position to the position of patrol deputy, where he will be under direct supervision.

The next day, Susan Riley sent Nelson's memo to the Professional Responsibility Unit, also known as internal affairs, with the comment that she felt that the matter "should be reviewed and followed-up" (Def. Ex. 3). The Sheriff testified that he is the one who decides that an internal affairs investigation is to be done and that he authorized such an investigation of the plaintiff.

On June 18, 1993, a detective in the Professional Responsibility Unit obtained a taped, sworn statement from the plaintiff. In that statement, the plaintiff said, contrary to the statement he gave to the Collier County Court Clerk, that he did not try to contact anybody in the Records division (Def. Ex. 3, Plt.'s 6-18-93 Statement, p.

4). He iterated that he had called Communications and that an unknown dispatcher verified that the warrant was active (*id.* at pp. 2, 4). The plaintiff also stated that, on May 31, he did not check the status of the warrant on a computer (*id.* at p. 6). He added, however, that there was no policy to use the computers to verify warrants at the beginning of a shift, and that, only after the Pray arrest, was he instructed by a supervisor to use the computer to verify warrants (*id.* at pp. 5, 6).

In his investigation, the internal affairs detective also obtained a sworn statement from the dispatcher that was on duty when the plaintiff said he called to check on the status of the Pray warrant. That dispatcher stated that, although the plaintiff did call on May 31 to verify the status of a warrant, it concerned another person and not Pray. Along with this testimony, the detective obtained a print-out of a computer screen which showed that, if the plaintiff had inquired about Pray, the dispatcher would have seen that the warrant was void.

On July 15, 1993, the detective sent an investigative report to Undersheriff Bob Burhans. The Sheriff subsequently reviewed the file and noticed inconsistencies. As a result, he asked for a follow-up interview with the plaintiff.

On August 25, 1993, the plaintiff provided a second sworn statement. He was asked about the discrepancy between his memo to the court clerk in which he said he had contacted the Records division and his first sworn statement in which he said he had not. The plaintiff repeated that he had not checked with Records on May 31 about the Pray warrant. When asked if he had falsified

the memorandum he gave to the court clerk's office, he stated (Def. Ex. 3, Plt.'s Statement of 8-25-93, pp. 2-3):

> I cannot say that I falsified any records. There's a little problem that, during the time that this incident happened on 5/31/93 at approximate[ly] 0930 hours. Afterwards Records had contacted our Sergeant, Sergeant Nelson, in our Warrants Bureau and advised me of the situation that the warrant had been canceled and wanted to find out why I didn't check the warrants in the computer and, due to the pressures that I was confronted with, later on I came over to Records to straighten the problem up. During that time, I was under a little bit of pressure and whenever I wrote this memo I did not contact Records. It's an error, my mistake, on my behalf.[2]

The internal affairs detective then asked the plaintiff about another discrepancy that had been developed, this one concerning his alleged telephone call to a dispatcher at Communications- regarding Pray. The plaintiff, upon inquiry, stated that his prior taped statement was correct in that respect. It was then pointed out to the plaintiff that the dispatcher had said that the plaintiff had only asked about another individual, and that, if Pray had been inquired about, the computer screen would have shown that the warrant was void. When called upon to explain these circumstances, the plaintiff stated (*id.* at p. 4):

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[2] It is noted that this purported excuse of pressure from Nelson is not true. Up to the time the plaintiff prepared his memorandum (and after), he had failed to bring the Pray matter to Nelson's attention.

> Okay. It's kind of weird, but my focus was on trying to run Frederick Pray on the computer. It could have been an error in my behalf, maybe instead of checking Frederick I might have checked Etienne [the other person] in this matter. But my mind was focused on Frederick, Frederick Pray doing that we were attempting the arrest. Again, it could have been a mistake on my behalf or maybe a mistake on my part.

After the second statement was obtained, a supplement to the internal affairs report was submitted to Undersheriff Burhans. On October 8, 1993, Undersheriff Burhans executed a sign-off sheet regarding the internal affairs investigation that found that certain charges were sustained and that directed discipline of a five-day suspension without pay, a letter of reprimand, and six months' probation (Def. Ex. 3). The document also contained an administrative note that the plaintiff was to be transferred from the Warrants Bureau to the Uniform Division.

The Sheriff testified that he authorized the issuance of a letter finding the plaintiff guilty of six violations. Accordingly, on October 11, 1993, Undersheriff Burhans sent a memorandum to the plaintiff, which stated, in part, as follows (Def. Ex. 9):

> As a consequence of your actions on May 31, 1993 in the matter of arrest of one Frederick Pray and subsequent investigation, you are found to be guilty of:
>
> a. inattention to duty
>
> b. dereliction of duty

c. insubordination – failure to follow specific instructions of Supervisor

d. falsification of an official document

e. lying (perjury) in a sworn statement

f. unprofessional behavior, thus discrediting CCSO

Accordingly, the following disciplinary action is awarded:

a. five (5) days suspension from duty without pay;

b. letter of reprimand; and

c. probation for a period of six (6) months from this date.

In the meantime, the plaintiff had met with Nelson and Riley on October 7, 1993. He was advised of the violations that he was found to have committed and of the disciplinary action that was to be imposed (Plt. Ex. 24). The plaintiff responded that, if he were transferred from Warrants to someplace he did not want to go, he would quit. Nelson urged the plaintiff not to do anything foolish since he had only three years to vest.

In addition, Lt. Roy Kipp, the supervisor of the road patrol to which the plaintiff had been transferred, asked the plaintiff not to quit. Kipp, with whom the plaintiff had a good working relationship, offered the plaintiff the shift of his choice in his home area of Immokalee and a newer car, if he transferred to the road patrol. Further, Kipp sent an officer to the plaintiff's home to encourage him not to quit. The officer told the plaintiff that Kipp wanted the plaintiff to stay on because he was Mexican-

American and Kipp could use him on road patrol to help out with interpretation and investigations.

Nevertheless, on October 29, 1993, the plaintiff submitted a letter of resignation from the Sheriff's Office. In the letter he stated, "If the Dept. feels I cannot function under warrants, then presumably, I cannot function in my demoted capacity as well" (Plt. Ex. 27). Three days later, he sent a memo to Lt. Kipp and the officers at the Immokalee substation commending their professionalism and stating that he always felt good working with them (Plt. Ex. 36).

The plaintiff subsequently filed this suit against the Sheriff alleging violations of various federal anti-discrimination laws. In the pretrial statement, the plaintiff summarized his claims as follows (Doc. 67, p. 2):

> Specifically, Mr. Avalos claims that he was punished, for allegedly serving an expired warrant, more severely than non-Mexican-American employees who have committed much more egregious wrongs, and that the disparate punishment was based upon his national origin, race/color and/or his disability.

Upon consent of the parties, the matter came before me for a jury trial. At the conclusion of the plaintiff's case, his claim of a hostile work environment was dismissed. Following presentation of all the evidence, claims of discrimination based upon the plaintiff's Mexican-American ancestry and an alleged disability were submitted to the jury. The jury found that the plaintiff had proven his claim that the Sheriff had discriminated against him because of his ancestry, but had not established his claim that the Sheriff discriminated against him

due to a perceived disability (Doc. 152). The jury awarded the plaintiff $120,000 for past lost earnings and benefits, $100,000 for future lost earnings and benefits, and $100,000 for pain and suffering (*Id.*). Judgment was entered on the verdict on December 12, 1996 (Doc. 153).

On December 26, 1996, the Sheriff filed a motion for judgment as a matter of law pursuant to Rule 50, F.R.Civ.P. (Doc. 162). The same day, he filed a separate motion for new trial under Rule 59, F.R.Civ.P. (Doc. 161). Argument was subsequently held on those motions.

II.

The plaintiff argues that the defendant's post-trial motions were untimely. Both Rule 50 and Rule 59 require a motion to be filed within 10 days after judgment. The plaintiff asserts that, because judgment was entered on December 12, 1996, the motions were too late when they were filed on December 26, 1996.

Rule 6(a), F.R.Civ.P., provides, however, that "[w1hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Under this provision, the defendant's motions were timely.

The plaintiff argues that the Eleventh Circuit has held that Rule 6(e), which allows an additional three days after service by mail, does not apply to Rule 59, *Cavaliere v. Allstate Insurance Company*, 996 F.2d 1111, 1113 (11th Cir. 1993), and that, similarly, Rule 6 (a) should not apply to Rule 59 and Rule 50. Rules 6(a) and 6(e) address different situations, and the plaintiff has provided no

reason for thinking that their effect upon Rules 50 and 59 should, nevertheless, be the same. Moreover, as the plaintiff acknowledges, the Committee Notes to Rule 6 clearly indicate that the computation provisions of Rule 6(a) apply to Rules 50 and 59. Accordingly, the plaintiff's argument that the defendant's post-trial motions are untimely is meritless.

It is appropriate to address, first, the defendant's motion for judgment as a matter of law under Rule 50. The standards for resolving a Rule 50 motion are well-established and were recently summarized in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996) (citations omitted) as follows:

> In considering a motion for judgment as a matter of law, a court must view all the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. . . . The motion should be granted only if upon such consideration, the court finds that reasonable people in the exercise of impartial judgment could not arrive at a contrary verdict. . . . The court may not weigh the evidence or decide the credibility of witnesses. . . . The nonmoving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law; "there must be a substantial conflict in evidence to support a jury question."

While these standards are well settled, their application in employment discrimination cases is not entirely clear. Thus, in *Isenbergh*, the court stated that it would look first to see whether the plaintiff had presented a

prima facie case of discrimination. 97 F.3d at 439. Consistent with this approach, the defendant argues that he is entitled to judgment as a matter of law because the plaintiff failed to establish a *prima facie* case of discriminatory treatment (Doc. 162, pp. 5-8).

By supplemental authority, the plaintiff, citing *Richardson v. Leeds Police Department*, 71 F.3d 801 (11th Cir. 1995), asserts that, "once the case is submitted to the trier of fact, the trial court may not revisit, on a Rule 50 motion, whether the plaintiff has made out a *prima facie* case of discrimination" (Doc. 175). *Richardson* pointed out that on a Rule 50 motion, the question whether the plaintiff made out a *prima facie* case is no longer relevant. 71 F.3d at 806. However, while the existence of a prima facie case is not to be revisited, the court does consider the evidence submitted by the plaintiff in connection with his prima facie case in evaluating whether a reasonable jury could make the ultimate finding of intentional discrimination. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997).

The approach set out in *Richardson* seems more consistent with the Supreme Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Consequently, the inquiry that will be undertaken in this case is simply whether, viewing the evidence in the light most favorable to the plaintiff, the jury could reasonably find that the Sheriff discriminated against him because of his Mexican ancestry.

III.

The Sheriff asserts that he took disciplinary action against the plaintiff due to the plaintiff's misconduct. The evidence in this case established without question that the Sheriff had ample basis for concluding that the plaintiff had been guilty of several instances of misconduct.

The plaintiff admitted at trial that Nelson had directed him to check the status of a warrant on his computer before making an arrest. He admitted further that he had failed to follow that direction with respect to Frederick Pray. These circumstances establish the charges of inattention to duty, dereliction of duty, and insubordination – failure to follow specific instructions of supervisor.

The plaintiff, furthermore, did not tell Nelson (or any other supervisor) of Pray's improper arrest. Nelson, rather, learned of the problem from an individual in a different section. The plaintiff's failure to tell Nelson of the bad arrest would seemingly constitute dereliction of duty. However, the internal affairs report did not focus on this deficiency, although Nelson complained about it in his memorandum and sworn statement. Thus, the failure to inform Nelson of Pray's erroneous arrest may not have been a basis for discipline.

Instead of telling Nelson about the problem, the plaintiff sought to remedy the matter himself by filing a statement with the Collier County Clerk's Office in an effort to cancel Pray's hearing date. That statement is the basis for the charge of falsification of an official document. In the statement, the plaintiff said that he had

checked with Records but that no one was in. The plaintiff subsequently admitted that that statement was false.

In addition, the plaintiff wrote in his statement to the court clerk that he had verified with a dispatcher that the warrant was active. That statement was certainly not true. The tapes of the calls to the dispatcher at Communications showed that, although the plaintiff had called in, he had not inquired about Pray's warrant. Further, the computer print-out established that, if he had asked about the warrant, he would have been told that it was void.

The plaintiff's assertion that he had verified the warrant with a dispatcher is also a basis for the charge of lying in a sworn statement. Thus, in both sworn statements, the plaintiff said that he called the dispatcher to verify that the warrant was active. That, as indicated, was not true.

After the plaintiff said in his second sworn statement that his prior testimony about calling Communications was true, he was informed of the tapes and computer print-out that showed the contrary. The plaintiff then stated that "[i]t could have been an error in my behalf, maybe instead of checking Frederick [Pray,] I might have checked [a different individual] in this matter" (Def. Ex. 3, Plt.'s Statement of 8-25-93, p. 4). The Sheriff's Office could reasonably find unpersuasive the plaintiff's somewhat weak attempt to suggest that he had simply made a mental error in saying that a dispatcher had verified Pray's warrant. After all, the plaintiff, as an experienced law enforcement officer, was expected to make accurate factual reports; the plaintiff's only arrest on May 31, 1993,

was Pray; the problem was brought to his attention about one or two days later; he made his statement to the court clerk by June 3, 1993; and he said in a sworn statement on June 19, 1993, that he called the dispatcher to verify that the warrant was active. Under all those circumstances, the Sheriff's Office could reasonably think that the plaintiff deliberately lied in his statements to the clerk and to the internal affairs investigator about verifying that the Pray warrant was active.

The record, furthermore, demonstrates additional instances of untruthfulness in the sworn statements. Thus, the plaintiff said that he did not know of a policy whereby he was allowed to use a computer at the Immokalee substation to verify warrants at the beginning of his shift, and that prior to the Pray incident no supervisor instructed him to use the computer to check warrants (Def. Ex. 3, Plt.'s Statement of 6-18-93, pp. 5-6). The plaintiff, however, admitted at trial that Nelson had instructed him to use the computer to verify arrest warrants (Doc. 163, Plt.'s Cross-Exam., p. 2).

Also, the plaintiff lied in his sworn statement when he was asked to explain why he had falsely stated in the memorandum to the court clerk that he had called Records in an attempt to verify the warrant. He answered that he said he had checked with Records because of the pressure he had received from his sergeant (Nelson) (Def. Ex. 3, Plt.'s Statement of 8-25-93, pp. 2-3). That is not true because, at the time the plaintiff wrote his memorandum saying falsely that he had called Records, Nelson was not aware of the problem and had not discussed the matter with the plaintiff.

Plaintiff's counsel argued at the hearing on the post-trial motions that "the jury found properly that he was falsely accused of lying; that it was a trumped-up type of charge" (Doc. 181, p. 30). This argument is baseless.

In the first place, the issue in this employment discrimination case is not whether the plaintiff was guilty of lying, but whether his employer concluded that he was guilty of lying. Thus, the law is clear that, even if an employer wrongfully believes that an employee has violated a company policy, it does not discriminate in violation of Title VII if it acts on that belief. *Conley v. Jackson Police Department*, 566 F.2d 994, 1003 n.14 (5th Cir 1978); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1256 (5th Cir. 1977).

Furthermore, the plaintiff in this case made no attempt to raise before the jury the veracity of his statements. While plaintiff's counsel insistently "assure[d]" the court at the post-trial motion hearing that he had argued to the jury that the plaintiff was falsely accused of lying (Doc. 181, p. 30), a review of the closing arguments shows the contrary. Thus, the plaintiff's approach during closing arguments was to acknowledge briefly his failure to check the computer and to contend that, because he was Mexican-American, he received greater punishment than did other deputies for comparable violations. In his argument, the plaintiff totally ignored the more serious charges of submitting a false statement and lying under oath. He certainly did not urge the jury to find that he had not lied.

In short, this case does not present the issue whether the charges of untruthfulness were "trumped-up," that is,

that they were pretextual. And even if it did, a reasonable juror would be compelled to find that the plaintiff lied in his statement to the court clerk about calling the Records section, and lied in his sworn statements concerning (1) the lack of any direction from his supervisor to check the computer and (2) that pressure from Nelson caused him to falsify the statement to the clerk. The only intentional falsehood that is even arguable is the plaintiff's statement that he had called a dispatcher and was told that Pray's warrant was active. Although the plaintiff belatedly said he may have been mistaken regarding the individual that was the subject of his inquiry, there is nothing in the record to suggest that the Sheriff's Office accepted that explanation.

Consequently, the evaluation of the evidence in this case must proceed on the basis that the Sheriff's Office honestly believed that the plaintiff committed the violations that it found to exist. In other words, the Sheriff disciplined the plaintiff, not just for failing to follow Nelson's directions regarding verifying arrest warrants, but, more importantly, for filing a false statement about the matter with the court clerk and for lying about it under oath. These latter violations are clearly serious. Indeed, the need for truthfulness by a law enforcement officer in reporting and testifying cannot be overstated, since truthfulness is essential to the integrity of the criminal justice system. Further, as plaintiff's counsel pointed out himself, a finding that a law enforcement officer has been untruthful can be used in future criminal prosecutions to "rip him to shreds" (Doc. 181, p. 17).

Under these circumstances, the findings of untruthfulness destroy the plaintiff's basic claim that he

received excessive punishment due to his ancestry. In the first place, the discipline that was imposed seems lenient. Thus, the specific penalties that were stated in the Sheriff's letter were a five-day suspension without pay, a letter of reprimand, and six months' probation (Def. Ex. 9). The Sheriff also referred the plaintiff to a psychologist for a fitness evaluation because the plaintiff told the internal affairs investigator he was under stress when he prepared the false document.[3] The plaintiff, in addition, was administratively transferred from handling fugitive warrants to the road patrol, and he considered this a demotion, although the Sheriff did not. In any event, while the transfer did deprive the plaintiff of certain freedoms he enjoyed in his prior position, there was no evidence that it carried any significant financial consequences.

The monetary penalty for submitting a false statement and for lying under oath was therefore simply the loss of five-days' pay. In my view, the Sheriff would have been fully justified in terminating the plaintiff for these infractions.[4] Consequently, because, in absolute terms,

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[3] The plaintiff viewed the psychological evaluation as objectionable. However, the psychologist in October 1993 found that the plaintiff was temporarily unfit for duty due to stress and alcohol abuse. The plaintiff resigned and did not return to the psychologist for a follow-up evaluation.

[4] There is presently before me another case in which a deputy sheriff was found to have made a false statement. In *Morris v. Crow*, Case No. 921604-CIV-T-17(B), a deputy was fired by the Sheriff of Polk County for filing a false report concerning the location of a minor collision between his patrol car and a motorcycle.

the sanction of the loss of five-days' pay, even when coupled with the administrative transfer, was so lenient for such serious offenses, there is no basis inferring that it was motivated by a discriminatory animus arising from the plaintiff's Mexican ancestry.

In any event, the plaintiff failed in his attempt to prove discrimination based upon other cases in which non-Mexican-Americans purportedly received more favorable treatment for alleged misconduct. The matters relied upon by the plaintiff in this respect are simply not comparable to his circumstances.

At the outset, it is noted that there is a disagreement concerning the degree to which cases must be comparable in order to permit an inference of discrimination. The defendant contends, and argued at trial, that, in order for such an inference to arise, a claimant must show, among other things, that "the misconduct for which he was disciplined was nearly identical to the misconduct of employees outside the protected class who were treated less severely" (Doc. 162, p. 5). This position is supported by language in cases such as *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984). The Eleventh Circuit has also said, however, that a *prima facie* case can be established by demonstrating, *inter alia*, that the claimant "engaged in misconduct similar to that of a person outside the protected class" and received more severe discipline. *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989).[5] In the context here, "similar" clearly

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[5] Interestingly, the court in *Jones* quoted the "nearly identical" language from *Nix*. 874 F.2d at 1540 n.9. Nevertheless,

seems broader, and to encompass more, than "nearly identical."

It is unnecessary to resolve this inconsistency because the plaintiff has failed to meet even the more lenient standard of "similar" misconduct. The plaintiff introduced evidence of two incidents in an effort to show that he was treated more severely than non-Mexican-Americans.[6] Since neither of those incidents involves a finding of untruthfulness, they are not similar to the Pray matter and cannot be used for comparison.

One of the incidents offered for comparison involved an attempt by deputies Todd Taylor and Rene Figueroa to execute an arrest warrant on Melvin Parker (*see* Plt. Ex. 49(a)). They went to his house and Melvin Parker's wife, Clara, came to the front door. Mrs. Parker told Figueroa that her husband was not home and that she did not know where he was. In the meantime, Taylor, at the rear, had seen a male sleeping in a back room, but could not make an identification due to darkness in the room. Taylor, after going to the front door, asked Mrs. Parker to have the individual come forward. Mrs. Parker refused and stated further that the officers could not enter without a search warrant. According to Taylor, Mrs. Parker then refused to listen to his explanation that he had

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it stated the pertinent element of the *prima facie* case as requiring "similar" misconduct. In my lexicon, "nearly identical" and "similar" are not synonymous.

[6] The plaintiff proffered evidence of additional incidents. That evidence was excluded because those incidents were even more dissimilar to the plaintiff's circumstances than the two that were adduced.

statutory authority to enter the house (Fla. Stat. § 901.19). Taylor said he was going to enter the house and look for the subject, and Mrs. Parker positioned herself in front of the door. Taylor started forward, making contact with Mrs. Parker, who stepped back. At this point, the individual came out of the back room, and Taylor saw that it was not Melvin Parker. As a result, the officers left.

Mrs. Parker subsequently went to the police station and made a complaint that two deputies had pushed and verbally harassed her. She identified Taylor, but did not know Figueroa's name. An investigation was pursued, during which statements were obtained from the two deputies. However, attempts to recontact Mrs. Parker were unsuccessful. As a result, the case was closed.

This matter plainly cannot provide a comparison for determining that the plaintiff was punished too harshly for his misconduct, thereby raising an inference of discrimination. In the first place, Mrs. Parker did not complain solely about Taylor, but complained about two deputies, one of whom was Figueroa, a Hispanic. More important, the allegations by Mrs. Parker were never found to be true and, in any event, did not remotely approximate the plaintiff's misconduct of submitting a false statement and lying under oath.

The second incident concerns the arrest of Grady Pruette by Deputy J.J. Carroll for disorderly conduct during a landlord-tenant dispute. The charge was not successfully prosecuted, and Pruette thereafter filed suit for a false arrest. The Sheriff subsequently disciplined Carroll by issuing a counseling order which directed Carroll

to re-read the disorderly conduct statute. No other discipline was imposed.

Carroll's error is not at all like the misconduct for which the plaintiff was disciplined. Thus, there was no indication that Carroll engaged in untruthfulness, or otherwise attempted to hide the matter from his supervisor.

The cases relied upon by the plaintiff to show disparate discipline are clearly dissimilar from the plaintiff's circumstances.[7] The plaintiff tries to make them comparable by arguing this case as if the plaintiff had only made a bad arrest. Of course, as explained, there is far more to it than that. When the submission of a false statement and the lying under oath are properly taken into account, it is obvious that the treatment received by deputies Taylor and Carroll (and Archie) cannot reasonably be the basis for judging whether the plaintiff's sanctions were too harsh and, inferentially, due to discrimination. In other words, a reasonable jury could not find, on the basis of the Parker and Pruette matters, that the plaintiff received excessive discipline because of his Mexican ancestry.

The plaintiff points to other purported evidence of discrimination in an effort to bolster his claim (Doc. 171,

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[7] The defendant notes that some testimony was presented at trial of a third episode suggested as a comparison. In that instance, Deputy Dave Archie, along with the plaintiff, erroneously arrested a person who looked like the subject of a warrant. Archie was not disciplined, and neither was the plaintiff. The plaintiff did not argue this incident to the jury and did not assert it in his post-trial memorandum. In any event, it is not similar since it did not involve false statements or lying under oath, as did the Pray matter.

p. 20). The plaintiff in this respect attempts to show that Riley, Nelson's supervisor, was biased against the plaintiff by pointing to a May 1989 contest concerning arrests by warrants. The plaintiff complains that Riley only gave him a half point for each arrest, but gave non-Mexican-Americans one point. It is questionable, however, whether this was Riley's policy, or one adopted for the contest by Kim Cherney, a prior supervisor of the plaintiff. In any event, the purpose apparently was to give some credit to the Naples deputies who served warrants in the jail facility. Thus, the distinction was not between Mexican-Americans and non-Mexican-Americans, but between deputies in Immokalee and those in Naples. Furthermore, the adjustment in the contest rules does not seem to have been unfair, since the plaintiff won the contest (Plt. Ex. 6n). Consequently, this circumstance does not indicate that Riley had an ethnic bias against the plaintiff.

It is noted that the plaintiff sought to make Riley the subject of his attack during the trial. In this respect, he focused upon a memorandum Riley wrote to the Sheriff on December 10, 1992, criticizing the plaintiff's attitude and work ethic (Plt. Ex. 17). Riley recommended in the memorandum three alternatives: (1) not reappointing the plaintiff, (2) transferring him to a different chain of command, or (3) having him psychologically examined for fitness for duty. The Sheriff, however, decided not to follow any of those options, and told Riley to document any deficiencies exhibited by the plaintiff. In all events, Riley's dissatisfaction with the plaintiff's attitude and work habits does not constitute evidence that she was biased against the plaintiff due to his Mexican ancestry.

Furthermore, Riley did not play the prominent role in the plaintiff's discipline that the plaintiff portrays. It was Nelson who discovered that the plaintiff was attempting to cover-up a bad arrest, who conducted the investigation that determined that the plaintiff's statement to the court clerk was false, and who wrote the memorandum to Riley advising her of those circumstances. Moreover, it was Nelson who recommended that the plaintiff be transferred to the road patrol where he would receive direct supervision. Significantly, the plaintiff stated during closing argument that "[n]o one has accused Kevin Nelson of discriminating against Mr. Avalos because of his national origin" (Doc. 163, Ex. 2, p. 40).

The plaintiff asserts, notwithstanding Nelson's part in the matter, that Riley "instigated" the internal affairs investigation (Doc. 171, p. 21).[8] While Riley initiated the internal affairs investigation, it was plainly prompted by Nelson's memorandum of June 10, 1993, which accused the plaintiff of "obviously lying in an attempt to cover a mistake" and which stated that the plaintiff "has violated numerous General Orders." Riley would seemingly be compelled to ask for an internal affairs investigation upon receiving that memorandum. Furthermore, it is the Sheriff, not Riley, who decides whether an internal affairs investigation is to be done. Under these circumstances, Riley cannot reasonably be thought to be biased against the plaintiff due to his ancestry simply because she initiated the internal affairs investigation.

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[8] Plaintiff's counsel's emphasis on that pejorative term is misplaced since it is his word, not Riley's.

The plaintiff also argued at length about the actions of Kim Cherney, who, at one time, was the plaintiff's immediate supervisor. Cherney, however, was transferred and replaced by Nelson prior to the Pray incident. Consequently, her actions do not provide evidence that the plaintiff's discipline in the Pray matter was substantially motivated by discrimination.

Nevertheless, it is appropriate to address the allegation that Cherney prohibited the plaintiff from speaking Spanish at work, since the plaintiff uses it in an attempt to show a discriminatory workplace. A partner of the plaintiff complained to Cherney that, while engaged in looking for fugitives, the plaintiff would speak to bilingual individuals in Spanish. Because the partner did not understand Spanish, he felt his ability to carry out his assignment, and perhaps his security, were compromised in this situation. Cherney consequently counseled the plaintiff not to speak Spanish when talking to a bilingual individual during the search for fugitives when he had a partner that did not understand Spanish. As the plaintiff acknowledged at trial, even with this policy, he spoke Spanish freely in the office and in the field. The minor limitation imposed on the plaintiff's ability to speak Spanish was both reasonable and implemented by a prior supervisor that had nothing to do with the imposition of discipline in the Pray matter. This restriction, accordingly, does not provide any evidentiary support for the claim that the plaintiff's sanctions were substantially motivated by a discriminatory intent.

In sum, the plaintiff has failed to present any evidence from which a jury could reasonably conclude that the plaintiff's Mexican ancestry was one of the reasons

for the discipline he received for his misconduct. This conclusion warrants a judgment in the defendant's favor and would render unnecessary a discussion of the plaintiff's claim of a constructive discharge. Nevertheless, for various reasons, comments on that claim are justified.

As previously indicated, the plaintiff's claim of a hostile work environment was dismissed at the close of the plaintiff's case. In my view, there was no evidence at all to support it. The lack of merit in that claim, and the related one of a constructive discharge, is underscored by the fact that the plaintiff's primary objection to the sanctions that were imposed seems to be the transfer from the Fugitive Warrants Bureau to the road patrol. If the conditions in the Fugitive Warrants Bureau were so intolerable, why would he object to the transfer?

Furthermore, the plaintiff cannot plausibly argue that his new position on the road patrol would be so oppressive as to generate a constructive discharge. His new supervisor would be Lt. Roy Kipp, a person with whom the plaintiff had a good working relationship. Moreover, the plaintiff sent a memo to Lt. Kipp and the officers at the Immokalee substation, where he was scheduled to work, praising them and their professionalism. Lt. Kipp, moreover, not only urged the plaintiff not to quit (and sent an emissary for this purpose as well), but he offered the plaintiff a newer car and his choice of shifts in Immokalee, the plaintiff's area of residence. The notion that these circumstances constitute a constructive discharge is preposterous. Consequently, the jury's award of $220,000 for lost wages due to a constructive discharge reveals the degree to which it was misled in this case. In all events, that award could not be permitted to stand.

IV.

The defendant has also filed a motion for new trial based primarily upon alleged trial errors (Doc. 161). Rule 50(c), F.R.Civ.P., directs that this motion also be addressed. In my view, none of the purported trial errors justifies a new trial.

The defendant also argues that a new trial is warranted on the ground of insufficient evidence. As previously explained, the evidence of intentional discrimination in this case is totally lacking, and this deficiency requires that judgment be entered in favor of the defendant. If, on appeal, the evidence is deemed sufficient to support the jury's verdict, this determination would also seemingly warrant rejection of the request for a new trial on the ground of insufficient evidence.

The defendant, in addition, contends that the jury instructions were erroneous because they did not reflect a "nearly identical" standard for comparison of other cases of discipline. As previously discussed, pp. 20-21, the precise language to be employed in the Eleventh Circuit is unsettled. If the "nearly identical" standard is the proper one, that would make the defendant's claim for judgment as a matter of law even more compelling. It is inconceivable to me that the court of appeals could determine that the correct language is "nearly identical," and also find that the plaintiff had presented sufficient evidence to meet that standard. In other words, there seems to be no circumstances under which a new trial would be justified due to an erroneous jury instruction.

For these reasons, the motion for a new trial should be denied.

V.

The plaintiff in this case made three fundamental mistakes: (1) He failed to follow his supervisor's instructions and, as a result, made a bad arrest; (2) he subsequently lied about what he had done in an effort to cover up his mistake; and (3) when he was disciplined for his misconduct, he quit his job. The blame for these actions falls entirely on the plaintiff.

The plaintiff, nevertheless, seeks to avoid the consequences for his actions by claiming that he was excessively disciplined due to his Mexican ancestry. The discipline imposed, however, was lenient in light of the seriousness of the plaintiff's misconduct. Moreover, the plaintiff did not adduce any cases of comparable misconduct imposed on non-Mexican-Americans, and he thus failed to show disparate treatment. Further, he did not introduce any other evidence of a discriminatory intent. As a result, there was no basis upon which the jury could reasonably find for the plaintiff. The defendant, therefore, is entitled to judgment as a matter of law.

It is, therefore, upon consideration

ORDERED:

1. That the Defendant's Motion for Judgment As A Matter of Law (Doc. 162) be, and the same is hereby **GRANTED**, and judgment will be entered in favor of the defendant.

2. That the Defendant's Motion for New Trial (Doc. 161) be, and the same is hereby **DENIED**.

DONE and ORDERED at Tampa, Florida, this 30th day of June, 1997.

/s/ Thomas G. Wilson
THOMAS G. WILSON
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MANUEL AVALOS, JR.,

Plaintiff,

-vs- CASE NO. 95-206-CIV-FTM-23D

DON HUNTER, Sheriff of Collier County,

Defendant.

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ORDER

Before the Court are the parties' cross-motions for summary judgment (Docs. 49 and 74) and the defendant's motion in limine (Docs. 68, 88, and 101). Upon consideration and for the reasons stated in the defendant's responsive papers, the plaintiff's motion for summary judgment (Doc. 74) is **DENIED**. Additionally, the defendant's motion for summary judgment (Doc. 49) is **GRANTED IN PART** and **DENIED IN PART**. The plaintiff cannot allege a substantive due process violation in this employment-related action. *See McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 898 (1995); *The Reserve, Ltd. v. Town of Longboat Key*, ___ F. Supp. ___, 1996 WL 384492 (M.D. Fla.). Accordingly, Count six of the First amended complaint is **DISMISSED WITHOUT PREJUDICE**.[1] However, as indicated by the

[1] In his motion for summary judgment (Doc. 49), the defendant incorporates by reference the arguments raised in his pending motion to dismiss (Doc. 7). Because the plaintiff failed to oppose the defendant's arguments with respect to count six,

plaintiff, counts three and four are not time-barred and triable fact issues regarding these and the remaining counts preclude summary judgment in the defendant's favor. Accordingly, with respect to counts one through five, the defendant's motion for summary judgment (Doc. 49) is **DENIED**. Further, the defendant's motions to dismiss and for leave to file motion to dismiss (Docs. 7 and 24) are **DENIED AS MOOT**. Finally, the defendant's motions in limine (Docs. 68, 88, and 101) are **DENIED WITHOUT PREJUDICE** to the defendant reasserting the motions at trial.[2]

ORDERED in Tampa, Florida, on August 19th, 1996.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES
DISTRICT JUDGE

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it is unlikely that the plaintiff intends to retain this claim by seeking leave to amend the complaint. Nevertheless, the plaintiff may, within ten days from the date of this order, seek appropriate relief in this regard pursuant to Rule 60, Federal Rules of Civil Procedure.

[2] The sundry related motions (Docs. 80, 87, 90, 94, 97, 102, and 106) are **DENIED AS MOOT**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2920

MANUEL AVALOS, JR.,
Plaintiff-Appellant, Cross-Appellee,

versus

DON HUNTER, Sheriff, Collier County,
Defendant-Appellee-Cross-Appellant,

RICCARDO B. RIVAS, Ph.D., GRADY PRUETTE,
Movants

No. 97-3398

MANUEL AVALOS, JR.,
Plaintiff-Appellant,

versus

DON HUNTER, Sheriff, Collier County,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

(Filed Apr. 27, 1999)

Before: ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MANUEL AVALOS, JR., Plaintiff, vs. DON HUNTER, SHERIFF OF COLLIER COUNTY, Defendant.	No. 95-206-CIV-PTM-23 Tampa, Florida December 11, 1996 9:30 a.m.

VOLUME 3
TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS C. WILSON,
United States Magistrate Judge, and a jury

* * *

[p. 110] Q Now, usually – and correct me if I'm wrong – if somebody has a personality problem with another person, to me that means that they don't like them very much. Would you agree with that?

A Yes, I would.

Q You don't like Mr. Avalos very much?

A No, I don't.

Q Do you feel that way about any other deputies?

A No, I don't.

MR. GARCIA: That's all I have, Your Honor.

MR. DIETZEN: Nothing further, Your Honor.

THE COURT: Mr. Garcia?

MR. GARCIA: Plaintiff rests.

THE COURT: Ladies and gentlemen, there will be some matters that we need to take care of. It will be easier if you just step into the jury room.

(Jury out at 2:05 p.m.)

THE COURT: What says the defendant?

MR. EVANS: Defense has a motion, Your Honor.

THE COURT: Go ahead.

MR. EVANS: Your Honor, the defendant moves under Rule 50 for a judgment as a matter of law. Defense contends that there is no legally sufficient basis for a reasonable jury to find for the plaintiff based upon what the plaintiff has presented by way of its case.

[p. 111] As the Court knows, currently the plaintiff has a disparate treatment claim pending, claimed under the American Disabilities Act and Rehabilitation Act, and also a claim for constructive discharge. It is our contention, Your Honor, that there is insufficient evidence for a reasonable jury to come back for the plaintiff under any one of these claims.

Let me speak first to the disparate treatment claim.

THE COURT: Just state the grounds. I don't want to hear argument.

MR. EVANS: Number one, he has not stated a Prima facie case. We contend that there was no evidence

to show there was any member of the Collier County Sheriff's Office that was similarly situated to the plaintiff and was outside the plaintiff's protected class who was, in fact, treated less severely than the plaintiff.

Again, without getting into the law, which the Court is well aware, there's no –

THE COURT: What's the next grounds?

MR. EVANS: Also, there is nothing to show that there is any causal connection to establish any differential treatment which he may have presented to the jury and his protected class as a Mexican/American.

Even if he stated a prima facie case, the Court [p. 112] knows at that point the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason. We have done that. Our burden is slight, and we have articulated without any question, indeed, the plaintiff has admitted to every single basis.

THE COURT: You are arguing. Just state your grounds.

MR. EVANS: Okay. We have met our burden.

THE COURT: I know all that.

What's the next thing?

MR. EVANS: I need to make the next one.

THE COURT: What's the next one?

MR. EVANS: Pretext.

THE COURT: Go on to the next one.

MR. EVANS: Ultimately, there is no evidence of discriminatory intent.

THE COURT: Next.

MR. EVANS: The next one is ADA, statute of limitation, workplace.

THE COURT: Your next is workplace harassment, Count 2.

MR. EVANS: Hostile work environment. There is no evidence to show pervasiveness, timeliness, outside the scope of the EEOC charge, agency, no direct or indirect liability. There is no evidence to show for the jury to [p. 113] come back on the hostile work environment.

THE COURT: All right.

MR. EVANS: ADA, the statute of limitations: When asked, he said he did not bring a claim for disability or perceived within one year. It is our contention that he needed to bring a claim to the Florida Commission on Human Rights, under 760.01, in order for him to protect his claim, and he has not done that.

Also with regard to ADA, the Court knows for perception, not his perception, not a subjective belief, but there is no evidence to show that any of the decision makers in the sheriff's office perceived that he was disabled.

THE COURT: I understand. Just state your grounds. Don't argue.

MR. EVANS: There is no evidence for the jury to find that there was a perception of disability.

And there is no evidence to show a mental impairment such as a psychological disorder for which there could be some perception of disability if the connection had been made.

And there is no evidence, also, to show that any of the employment action taken was the sole result of any perception of disability.

THE COURT: So what? That isn't the test. The Eleventh Circuit has just entered a decision last week or [p. 114] the week before. It's the but-for test. So go ahead.

MR. EVANS: With that in mind, constructive discharge –

THE COURT: Well, there isn't a constructive discharge claim.

MR. EVANS: I understand, but I'm saying there's not enough for this jury to be able to rule on a constructive discharge claim when there is no evidence of intolerable working conditions. Our contention is the jury shouldn't even hear it.

THE COURT: Is that it?

MR. EVANS: Yes.

THE COURT: Mr. Garcia, what do you have to say about, if anything, in defense of Court Number 2?

MR. GARCIA: The hostile work environment?

THE COURT: Yes. That's your claim.

MR. GARCIA: Yes, Your Honor. I would say that there is evidence that a reasonable jury could find a hostile work environment.

THE COURT: For what?

MR. GARCIA: In terms of the disciplinary actions that were taken, there's a case called Bell verses –

THE COURT: That makes Count 2 exactly the same as Count 1.

MR. GARCIA: Pardon?

[p. 115] THE COURT: That makes Count 2 exactly the same as Count 1.

MR. GARCIA: Well, no, not exactly, because Count 1 does contain a constructive discharge claim.

Count 2, the only difference is that this has to do with the environment.

THE COURT: I'm not going to instruct the jury on hostile work environment. There's no evidence of it. It just clutters up the case. I'm granting judgment, as a matter of law, on Count 2.

MR. GARCIA: Your Honor, may I just briefly state a couple of things –

THE COURT: You can discuss it –

MR. GARCIA: Right, but I just want to say that there's a case that I think is right on point called Bell versus –

THE COURT: You can appeal it. There's absolutely none – we discussed it. You acknowledge there's nothing even remotely close in time. The statute of limitations bars it. There wasn't an EEOC claim. I'm not going to instruct the jury on a hostile work environment claim.

I'm not. I instruct them on a whole lot of things that are lame and weak, but that one is nonexistent. So that's out.

MR. GARCIA: Your Honor, I just want to make the record that the findings of fact of the appeals referee we [p. 116] think are binding on the jury in terms of the –

THE COURT: Well, you have been making that argument before, so that's in the record.

Let me suggest and I will suggest this at the time of the instructions. I will deny it otherwise, and I will instruct on the disability claim. It is one feeble, lame, weak claim. It seems to me that you are risking your credibility if you argue it. So I'm not going to instruct it unless you are going to assure me you're going to argue it.

MR. GARCIA: I am going to argue it.

THE COURT: Okay. Then they can question the credibility of everything you say, because that claim is really weak. I'm going to get an answer from the jury just because they're there, but I don't see it. And if they come back on it, I will probably direct a verdict, but it's up to you.

Bring in the jury.

(Jury seated at 1:55 p.m.)

THE COURT: What says the defendant?

MR. EVANS: Your Honor, we call Kevin Nelson.

THE CLERK: Could you raise your right hand, please?

DEFENDANT'S WITNESS, ROY
KEVIN NELSON, SWORN

THE CLERK: Please state your full name, and spell your last name.

* * *

UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

MANUEL AVALOS, JR.,

Appellant,

vs.

DON HUNTER, in his official capacity as Sheriff of Collier County,

Appellee.
_____/

CASE NO.: 97-2920;
97-3398
DC DKT NO.:
95-206-CIV-FTM-23D

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

ON APPEAL FROM THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

Parties on Appeal

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2. Don Hunter, Appellee

Attorneys

3. Garcia, Elkins, Carbonell & Boehringer, P.A., f/k/a Garcia, Elkins & Carbonell, P.A., Attorneys for Appellant
4. Leonard Dietzen, III, Esq., Attorney for Appellee
5. R.W. Evans, Esq., Attorney for Appellee
6. Isidro M. Garcia, Esq., Attorney for Appellant
7. William Powers, P.A., Attorneys for Appellee

Defendant in proceedings below

8. Don Hunter, Sheriff of Collier County

Trial Court Judge

9. Hon. Thomas A. Wilson, Magistrate Judge, Middle District of Florida
10. Hon. Steven Merryday, Judge, U.S. District Court
11. Hon. George Swartz, Magistrate Judge, Middle District of Florida

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CERTIFICATE OF COUNSEL FOR *EN BANC* CONSIDERATION

I express a belief based on a careful and studied review of the trial record that the panel decision has failed to adhere to the following precedents of this Court

and that consideration by the full Court is necessary to secure and maintain uniformity of decisions. The cases which I believe the panel failed to properly apply and which are controlling of the disposition of this case are: *Richardson v. Leeds Police Department*, 71 F.3d 801 (11th Cir. 1995) and *Olmstead v. Taco Bell Corporation*, 141 F.3d 1457 (11th Cir. 1998).

STATEMENT OF THE ISSUES THAT MERIT *EN BANC* CONSIDERATION

1. Did the trial court err in revisiting the sufficiency of the evidence on appellant/plaintiff's national origin discrimination claim after denying the defendant's motion for judgment as a matter of law at the close of plaintiff's claim and after the jury returned a verdict for the plaintiff?

2. Did the trial court err in purporting to review the credibility and weigh [sic] of the evidence to justify reversing the jury's verdict for the plaintiff?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CAUSE

Manuel Avalos, Jr., appellant/plaintiff, is a former deputy sheriff of the Collier County, Florida sheriff's department. He brought suit against the sheriff, Don Hunter, in his official capacity, for national origin and disability discrimination. The case was tried in Tampa, Florida. The trial court, the Hon. Thomas Wilson, U.S. Magistrate Judge, *granted* the defendant's motion for judgment as a matter of law at the close of the plaintiff's case on the hostile work environment claim, but *denied*

the defendant's motion in all other respects, including the national origin and disability discrimination claims. Defendant then presented its case, Mr. Avalos offered a brief rebuttal, and the jury deliberated. The jury returned a verdict for Mr. Avalos on the national origin discrimination claim for the amount of $320,000, which included back pay, front pay and an award of compensatory damages, and for the defendant on the disability discrimination claim.

Defendant then filed a motion for a new trial and renewed motion for judgment as a matter of law, which Mr. Avalos opposed. The trial court granted the motion for judgment as a matter of law, vacated the jury's verdict and awarded costs against Mr. Avalos. This appeal followed.

The panel affirmed the magistrate's ruling in a one paragraph unpublished opinion, provided herewith as **Exhibit 1.** Mr. Avalos seeks rehearing and *en banc* consideration because the panel decision fails to adhere to binding precedent from this Court which the trial court failed to follow.

STATEMENT OF FACTS NECESSARY FOR ARGUMENT OF THE ISSUES

Mr. Avalos was a nine (9) year veteran of the Collier County Sheriff's Department who had an exemplary work history. He was hired by defendant Hunter's predecessor in office. His direct supervisors towards the latter part of his employment were Susan Riley, Kim Cherney (both civilian employees who were not certified). About six (6) months prior to his separation from employment,

Ms. Riley, despite admitting that she had absolutely no problems with Mr. Avalos' work performance, requested that the sheriff not re-appoint him as a deputy because of Mr. Avalos' complaints of discrimination and reputed intentions to sue the sheriff's department.

By her own admission, Riley, about six (6) months following this secret memorandum, which was never shared with Mr. Avalos, "instigated" an internal affairs investigation of him concerning the arrest of a Frederick Pray. Mr. Pray had been arrested by Mr. Avalos and a Caucasian deputy, Steven Dest, on a warrant which, unbeknownst to the two of them, had been recalled. This investigation led to charges against Mr. Avalos which resulted in disciplinary action, including a demotion from warrants plain clothes officer to road patrol deputy (an entry level position), a suspension, a mandatory psychological evaluation, and probationary status. Because Mr. Avalos believed that the charges had been trumped up by Riley and others eager to seek his ouster for discriminatory reasons, he asked to meet with defendant Hunter, who advertised an open door policy to resolve employee grievances. Hunter refused to meet with him, and Mr. Avalos, believing his integrity had been unfairly challenged and his position within the sheriff's department permanently destroyed, resigned his employment.

ARGUMENT AND AUTHORITIES

The panel decision, attached as **Exhibit 1**, is contrary to prior decisions of this Court, and accordingly, must be vacated.

This case involved a claim of national origin discrimination brought by appellant/plaintiff Manuel Avalos, Jr., a nine (9) year veteran deputy sheriff employed by the Collier County, Florida sheriff's department. Mr. Avalos' claim is that he was discriminated against when he was demoted, subjected to disparate discipline and constructively discharged. Mr. Avalos, one of the first and one of the very few persons of Mexican American origin to be employed by the Collier County Sheriff's Department, brought this suit against the defendant, Don Hunter, in his official capacity as the Sheriff of Collier County. The trial court, the Honorable Thomas Wilson, magistrate judge, presided over the trial on consent of the parties. At the close of all the evidence, the magistrate granted the defendant's motion for judgment as a matter of law on the hostile work environment claim, and denied the motion in all other respects. R-8-204-115-116. Thereafter, an all white[1] jūry returned a verdict in favor of the plaintiff and awarded $320,000.00 in damages.

Defendant then filed a motion for a new trial and motion for judgment as a matter of law, which was opposed, but which the trial court granted. R-4-192. Thereafter appellant filed an appeal to this Court, and

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[1] The defendant unlawfully used a peremptory challenge against the only minority member of the venire, an African American woman. The magistrate improperly permitted this unlawful use of the peremptory challenge, over objection, and did not even require the defendant to articulate the reasons for exercising the challenge.(R-6-54).

defendant cross appealed the denial of its motion for summary Judgment.[2]

The panel decision in this case ignored well-established precedent of this Court when it affirmed the magistrate's ruling. The only basis stated by the panel for its affirmance is that " . . . we agree with the court below that plaintiff-appellant failed to present to the jury sufficient evidence to support the jury's verdict." *See* **Exhibit 1**, p. 2. This holding does not conform to prior precedent from this Court that forbids a trial court from denying a motion for judgment as a matter of law, and then revisiting the issue of whether or not plaintiff adduced enough evidence to get to the jury. Once the trial court submitted the national origin discrimination claim to the jury, it did not have the authority to determine that plaintiff had failed to produce sufficient evidence to establish a *prima facie* case of discrimination. *Richardson v. Leeds Police Department*, 71 F. 3d 801, 806 (11th Cir. 1995), which decision had relied upon Supreme Court precedent in the case of *United States Postal Service v. Aikens*, 460 U.S. 711, 716-717 (1983). The panel decision does not even attempt to address *Richardson;* instead, by not discussing it, it has overruled its application, at least in this case. If *Richardson* is the law, then there is no principled manner in which it can be ignored by the panel, since it clearly does not permit the actions of the magistrate in this case. Since binding precedent from this Court has not been adhered to by the panel, rehearing *en banc* is appropriate and should be granted.

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[2] The summary judgment motion was denied by the Honorable Steven Merryday prior to trial.

5. The panel decision also ignored or failed to apply binding precedent from this Court on review of the grant of a judgment as a matter of law that upsets a jury's verdict. This Court has held repeatedly that it reviews *de novo* the trial court's grant of a renewed motion for judgment as a matter of law. *Olmstead v. Taco Bell Corporation*, 141 F. 3d 1457 (11th Cir. 1998). In reviewing the sufficiency of the evidence to support the jury's verdict, the reviewing court draws all reasonable inferences in favor of the non-movant. *Morro v. City of Birmingham*, 117 F. 3d 508, 513 (11th Cir. 1997). As this Court just recently proclaimed in *Olmstead:* "We have previously noted that, in conducting our review of a renewed motion for judgment as a matter of law after a jury has rendered its verdict, '[w]e must determine whether the evidence is such that, *without weighing the credibility of witnesses or otherwise considering the weight of the evidence*, there can be but one conclusion as to the verdict that reasonable men could have reached.' " *Olmstead*, 117 F. 2d at 1460 (citations omitted, emphasis added). As was amply demonstrated in the Appellant's Brief, after denying defendant's motion for judgment as a matter of law on the claim in which plaintiff prevailed, the trial court purported to revisit the credibility of the plaintiff and sufficiency of the weight of the evidence to rescue the appellee/defendant from the jury's verdict. There was no justification or basis for the trial court to usurp the fact finding and credibility determination functions from the trier of fact, and the panel's failure to address this issue constitutes a departure from prior precedent of this Court. The magistrate, by purporting to revisit the issue of credibility and weight of the evidence, placed itself in the role of a

"super juror." This type of judicial review of the jury's factual determinations violated Mr. Avalos' constitutional right to a trial by jury.

Plaintiff established, to the satisfaction of the jury, that he was subjected to disparate discipline for making an arrest based on a warrant, which, unbeknownst to him, had expired. He was demoted from his detective's position, coerced into undergoing a psychological evaluation, suspended from his employment, and placed on probation, despite a career that was exemplary before the trumped up charges that were made against him. He also demonstrated that white officers similarly situated were not disciplined for conduct that was more egregious than anything he was charged with.

The evidence of disparate treatment favoring white officers was substantial and it is recounted herein, from the Initial Brief, for the members of the Court that did not participate in the panel:

"The incident that led to Mr. Avalos separation from his employment began on May 31, 1993, only slightly more than six (6) months after [Susan] Riley wrote her memorandum requesting Mr. Avalos termination (Plaintiff's exhibit 17). Mr. Avalos was assigned to work with Stephen Dest, who ordinarily was assigned to work as a court bailiff (R., 6-202-124). That morning, Mr. Avalos and Mr. Dest picked up arrest packets for a number of individuals, including Frederick Pray (R., 6-202-125-127). The deputies do not usually have the warrant to effect the arrest, but have other materials which may be copies of the warrants and computer printouts (R., 6-202-126). Mr. Avalos did try to verify the warrant by calling Kevin

Nelson's office, but because it was a holiday, no one answered the telephone (R., 6-202-126-127). Neither he nor deputy Dest checked the computers that morning before effecting Mr. Pray's arrest (R., 6-202-127). Mr. Avalos and Dest apprehended Pray without incident or use of force (R., 6-202-128). They then brought Pray to the station and released him on his own recognizance after about 30 minutes; Mr. Avalos even offered Pray a ride home (R., 6-202-127).

"A few days later, Mr. Avalos was approached by Katina Martinez, a clerk with the Sheriff's office, who advised him the arrest warrant on Pray had expired before he was arrested and who asked him to write a memorandum to explain the arrest (R., 6-202-128-129). Mr. Avalos complied with this and thought it would be the end of the matter; he was later approached by Jody Hendry, from internal affairs, who advised him he was under investigation for the Pray matter (R., 6-202-130). Riley subsequently told Mr. Avalos that he would be transferred to road patrol from warrants, charged with insubordination and dereliction of duties, suspended for five (5) days, and would be referred to a psychiatrist for an evaluation (R., 6-202-131).[3] Believing that the charges

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[3] Riley was intimately involved with the disciplinary action received by the plaintiff, although one would think from reading the order granting judgment as a matter of law that it was Lt. Nelson, not Riley, who orchestrated this railroading. Riley admitted in her testimony that she "instigated" the internal affairs investigation (R., 8-204-79). Although the trial transcript reads that her testimony was that she admitted to "Instituting" the investigation, the word that appears on page 88 of her deposition transcript was "instigated," not "instituted" as incorrectly appears in the transcript.

and discipline administered to him were grossly excessive[4] for what was a good faith error in serving a facially valid arrest warrant, Mr. Avalos attempted to meet with defendant Hunter who advertises an 'open door' policy to his employees (R., 6-202-132-133). Knowing that the discipline meted out to him was totally out of proportion to what others had in the past received for more serious transgressions, he took time off; he became so despondent he had thoughts of harming himself (R., 6-202-136-138). When he was rebuffed in his efforts to see the sheriff, and because the so called "transfer" to road patrol was for him a humiliating form of discipline and a demotion,[5] he resigned his employment (R., 6-202-133-134).

[. . .]

"Plaintiff focused his disparate treatment evidence on the conduct of two white deputies: Todd Taylor, a

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[4] The policy which plaintiff was accused of breaching, checking the computer prior to going on the road to serve a warrant, was a new policy that had been started on May 13, 1993 (Defendant's Exhibit 3; R., 9-205, discussed in plaintiff's closing argument). Hence, this is a policy that was relatively new to the department.

[5] Although defendant vigorously argued to the jury that this was not a demotion, Mr. Avalos was not the only deputy who felt this way. Rene Figueroa, a former warrants officer then working in another part of the sheriff's office, testified that such a "transfer" would be a "demotion" and it would be so perceived by any officer (R., 7-203-51-52). Obviously, the trier of fact did not believe the defendant's argument.

fugitive warrants officer, and J.J. Carroll, a road deputy.[6] Both of the incidents these deputies were involved in took place in Immokalee and both deputies are Caucasian. The Archie incident was not abandoned, as the trial court assumed; it is in the record and the jury was entitled to rely upon it as evidence of disparity. However, the Taylor and Carroll incidents involved what appears to be intentional wrongdoing, so they are discussed more prominently here and were highlighted in closing argument to the jury.

"The Todd Taylor incident involved an African American woman, named Clara Parker who filed a written complaint with the sheriff's office about the misconduct of deputy Taylor, whom she alleged barged into her home, without a valid warrant, scaring her and her two young children, bumping into her as he barged through the front door, and using abusive language towards her as he did so (Plaintiff's Exhibit 49A, admitted, R., 8-204-178; discussed in closing argument, R., 9-205-39-43). Ms. Cherney did not appear at trial, but plaintiff read portions of her deposition, in which it was established that: 1. She first denied under oath ever receiving a complaint concerning Taylor, or speaking to Ms. Parker concerning her complaint against him; 2. She then said maybe the duty officer took Ms. Parker's complaint; 3.

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[6] The trial court had earlier excluded, improperly, other incidents which demonstrated more lenient treatment afforded to white deputies, limiting the plaintiff to indigents involving Todd Taylor, J.J. Carroll and Dave Archie. Deputy Archie, with plaintiff serving as a back up, falsely arrested a man who was not the person sought by the warrant. Deputy Archie was not disciplined for this error (R., 6-202-117-118).

Then she modified her testimony further and said perhaps she did speak to Ms. Parker after all, but then couldn't reach her to further process Ms. Parker's written complaint (R., 8-204-204-106-108). Her deposition testimony, read to the jury, was thoroughly impeached by plaintiff's Exhibit 49A which established that Ms. Parker made a written complaint against Mr. Taylor, and, instead of the matter being sent up the chain of command to Internal Affairs, as Ms. Cherney testified was necessary (R., 8-106), *Ms. Cherney documented her efforts to dissuade Ms. Parker from pursuing the complaint further* (Plaintiff's Exhibit 49A; R., 9-205-40). This is in stark contrast with the actions taken by Ms. Riley when she learned of the "false arrest" charge against the plaintiff: she sent two (2) deputies, Tritt and Figueroa, *to tell Mr. Pray that he had been falsely arrested* (Defendant Exhibit 3), no doubt for the purpose of inciting him to file a complaint, perhaps even a law suit, so she could get Mr. Avalos fired. Yet, unlike Ms. Parker, Mr. Pray never saw the need to file a complaint, or a law suit, concerning arrest by Mr. Avalos and Dest[7] (R., 6-202-128).

"J.J. Carroll is a Caucasian deputy who was sued for the false arrest of Grady Pruette in Immokalee (R., 7-203-111-112). Carroll's "discipline" for this incident was

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[7] Dest is the deputy who accompanied Mr. Avalos on the Pray arrest. Although he held the same rank as the plaintiff, and participated to the same extent in the arrest, he was not disciplined, or even investigated, for the Pray arrest, despite being a joint participant (R., 6-202-127). This is again evidence of disparate treatment favoring the Caucasian deputy over Mr. Avalos, and evidence on Riley's attempts to "zero in" on her mark, the plaintiff.

to read the statute concerning "disorderly conduct" which took him all of 15 minutes (R., 7-203-114).[8] Mr. Pruette suffered from chest pains during the arrest by Carroll (R., 7-203-119). Mr. Pruette was falsely charged with disorderly conduct, a charge of which he was wholly exonerated (R., 6-202-112). Clearly, viewing the evidence in the light most favorable to the plaintiff, as the trial court should have done, a reasonable jury could surmise from the foregoing: 1) Pruette was falsely arrested; and, 2) Carroll should have been disciplined. The trial court, despite permitting the defendant to misleadingly argue to the jury that Mr. Avalos' conduct "could have" resulted in civil liability, did not permit the plaintiff to demonstrate that the conduct of Carroll *did* result in civil liability, since defendant had to pay Mr. Pruette in excess of $37,000 for the false arrest and excessive use of force perpetrated by Carroll.

[Appellant's Initial Brief, pp. 20-29.]

This evidence was more than sufficient to sustain the verdict for the plaintiff, and the panel's decision affirming the magistrate's vacating of the jury's verdict is incorrect and should be reviewed by the entire Court.

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[8] The trial court did not permit plaintiff to establish with this witness that Mr. Pruette settled a suit for damages against Carroll and sheriff's office for false arrest, excessive force and violations of his rights under the constitution (R., 7-203-112). However, the jury did learn that unlike the case of Mr. Avalos with the Pray arrest, Carroll was sued by Mr. Pruette (R., 6-202-112).

CONCLUSION

The panel decision fails to apply binding precedent from this Court on two issues: first, the law is clear that when a trial court denies a Rule 50 motion at the conclusion of the plaintiff's case, it may not revisit the sufficiency of the evidence to establish a *prima facie* case. The trial court permitted the claim to go to the jury, denied the defendant's Rule 50 motion, then determined that plaintiff's evidence was insufficient to establish a claim of national origin discrimination. The panel's failure to address this matter deprives the plaintiff of the opportunity to benefit from the legal precedent this Court has set. Second, the law is clear that a trial court may not weigh the evidence, or the credibility of the parties, to justify setting aside a verdict it finds unpalatable. The panel's failure to address this basis for the trial court's action in effect abrogates this principal and permits the trial court to exercise the power of a "super juror," which under our system of constitutional law where a right to jury trial is guaranteed, is impermissible. Accordingly, it is respectfully requested that the Court grant rehearing and *en banc* consideration of the issues raised here.

Respectfully submitted,

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Florida Bar No. 437883

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing was furnished, via regular U.S. Mail, to: Leonard Dietzen, III, Esquire, and R. W. Evans, Esquire, William Powers, P.A., P.O. Box 12186, Tallahassee, Florida, 32317-2186 this 25th day of February, 1999.

/s/ Isidro M. Garcia
ISIDRO M. GARCIA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

CASE NO: 95-206-CIV-FTM-23D

MANUEL AVALOS, JR.,

Plaintiff,

vs.

DON HUNTER, in his official capacity as Sheriff of Collier County, Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

The Defendant, DON HUNTER, by and through his undersigned counsel moves for judgment as a matter of law, or in the aternative, moves for a new trial pursuant to Rule 50, Fed.R.Civ.P. In support thereof, the Defendant states the following:

1. The evidence is insufficient as a matter of law to support the jury's finding of disparate treatment. Plaintiff failed to establish a prima facie case of disparate treatment because there was no evidence that similarly situated non-Mexican American Officers were disciplined less severly for nearly identical conduct. Furthermore, the Plaintiff presented no evidence to establish a causal connection between the Plaintiff's protected class and any differential treatment which may have occurred.

2. Even if the Plaintiff established a prima facie case of disparate treatment, the Defendant articulated a legitimate, non-discriminatory reason for the Plaintiff's five days suspension, fitness for duty referral, probationary status, and transfer to the road. Although the Defendant was not required to prove Plaintiff's misconduct, the evidence, including Plaintiff's admissions, revealed that the Plaintiff arrested Frederick Pray on a warrant which had been canceled four days earlier; that he disobeyed a direct order from his supervisor, Sgt. Kevin Nelson, to confirm the validity of the warrant before he arrested Pray; that he misrepresented the facts concerning his efforts to check the validity of the warrant in a document prepared for the clerk of the court; that he neglected his duties as a fugitive warrants officer by failing to confirm the active status of the warrant; and that he misrepresented the truth when questioned during the internal affairs investigation. It is undisputed that Sheriff Don Hunter relied upon the internal affairs investigation, which documented Plaintiff's misconduct, in approving the disciplinary action, probationary status, transfer, and fitness for duty referral.

3. Once the Defendant articulated a legitimate, non-discriminatory reason, Plaintiff was required to prove intentional discrimination by the Defendant as a result of the Plaintiffs' national origin. There is no evidence that the stated reasons for Plaintiff's discipline, transfer and fitness for duty referral were pretextual due to the Plaintiff's status as a Mexican-American. A reasonable jury would not find that Plaintiff met his ultimate burden of proving that Sheriff Don Hunter intentionally discriminated against the Plaintiff because of his national origin.

4. The Plaintiff also failed to show that he was constructively discharged by the Defendant. A reasonable jury would not find, based on the evidence, that the Plaintiff's working conditions were so intolerable that he was compelled to resign.

5. There is insufficient evidence to support as a matter of law Plaintiff's damages award. Because Plaintiff failed to prove that he was constructively discharged, the back pay and front pay awards of $120,000.00 and $100,000.00 respectively cannot stand. Furthermore, the jury's award of $100,000.00 for mental anguish is unsupported by the record due to Plaintiff's testimony which linked his mental anguish to his alleged constructive discharge. Thus, even if the Court finds that there was some disparate treatment, a reasonable jury would not find that Plaintiff suffered emotional distress as a result of being disparately treated, because Plaintiff was not constructively discharged.

6. Even if the evidence supports a finding of disparate treatment, the Defendant's liability is either absolved or limited because the employment action against the Plaintiff would have occurred in any event, regardless of Plaintiff's national origin. Accordingly, the damages should be vacated.

MEMORANDUM OF LAW

This memorandum of law is submitted in accordance with the Local Rules of this Court.

BACKGROUND

The Defendant timely raised his motion for judgment as a matter of law at the close of the Plaintiff's case, and at the close of all the evidence. The court granted the motion with respect to Count II of the Plaintiff's Amended Complaint, which alleged that he was subjected to a hostile work environment, but reserved a ruling on the remainder of the Defendant's motion which attacked Plaintiff's disparate treatment and disability claims, as well as Plaintiff's claim of constructive discharge.

The jury returned a verdict in favor of the Plaintiff, finding that he had been disparately treated. The jury awarded the Plaintiff past lost earnings in the amount of $120,000.00, future lost earnings in the amount $100,000.00 and pain and suffering in the amount of $100,000.00 for a total of $320,000.00. The jury did not find that the Defendant had discriminated against the Plaintiff due to his disability.

STANDARD OF REVIEW

A motion for judgment as a matter of law renewed after return of a jury verdict is controlled by Fed.R.Civ.P. 50(b). In considering such a motion, the court may allow the judgment to stand, order a new trial, or enter judgment as a matter of law. Fed.R.Civ.P. 50(b)(1)(A)-(C). To enter judgment as a matter of law, the court must find all the evidence and the inferences drawn therefrom, taken in the light most favorable to the non-movant are so one-sided that reasonable jurors could not agree to a contrary verdict. *Walker v. NationsBank of Florida, N.A.*, 53 F.3d

1548, 1555 (11th Cir. 1995). A mere scintilla or evidence is insufficient to avoid judgment as a matter of law; the evidence must be substantial. *Vinyard v. County of Murray, Georgia*, 990 F.2d 1207, 1210 (11th Cir.), *cert.den.* ___ U.S. ___, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993).

DISPARATE TREATMENT

Race and national origin discrimination claims supported by circumstantial evidence are evaluated by the framework set out by the United States Supreme Court in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Bushby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991); *Avril v. The Village South, Inc.*, 10 Fla.L.Weekly Fed D324 (M.D. Fla. 1996). The Plaintiff has the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. Assuming that the Plaintiff has met this initial burden, the defendant has the burden to produce a "legitimate, non-discriminatory reason" for the allegedly discriminatory employment action. *Id.* If the defendant satisfies the burden of production, the plaintiff must prove by a preponderance of the evidence that reasons offered by the defendant are but a pretext for discrimination, and must persuade the fact finder that the defendant intentionally discriminated against the plaintiff. *Id.* at 804; *Harris v. Shelby County Board of Education*, 10 Fla.L.Weekly Fed C539 (11th Cir. 1996).

PRIMA FACIE CASE

As the Defendant argued at trial in his Rule 50 motion, the Defendant is entitled to judgment as a matter of law because the Plaintiff failed to establish a prima

facie case of discriminatory treatment. To meet this initial burden, the Plaintiff was required to show the following: 1) that he is a member of a protected class under Title VII; 2) that he was qualified for the job; 3) that the misconduct for which he was disciplined was nearly identical to the misconduct of employees outside the protected class who were treated less severely; and 4) that sufficient direct or circumstantial evidence exists to infer a nexus or causal connection between the protected classification and the disparate treatment. *Martinez v. U.S. Sugar Corp*, 880 F.Supp. 773 (M.D. Fla. 1995); *Ebeh v. Trithart*, 9 Fla.L.Weekly Fed. D631 (M.D. Fla. 1996), *citing McDonnell Douglas; McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984). The Plaintiff failed to meet the second, third and fourth prongs of this test.

To begin with, the Plaintiff was not qualified to serve as a fugitive warrants deputy or as a deputy sheriff. Dr. Rivas testified that the Plaintiff should be given a light duty assignment because he was not fit to perform the duties of a deputy sheriff due to his perceived stress and emotional instability. Dr. Rivas, who was testifying as the Plaintiff's witness, provided evidence that the Plaintiff was not qualified to serve as a fugitive Warrants deputy, or indeed, a deputy sheriff of the Collier County Sheriff's Office.

More importantly, even if the Plaintiff was qualified for his position, the Plaintiff offered no evidence to show that similarly situated, non-Mexican American officers were disciplined less severely than the Plaintiff. The Plaintiff was required to prove that the conduct for which he was disciplined was "nearly identical" to that engaged

in by employees outside his protected class who were not treated as severely by the Defendant. *Nix*, 738 F.2d at 1885. It is not enough for Plaintiff to allege similarity of conduct. In *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992), the court rejected the plaintiff's attempt to state a prima facie case of race discrimination by alleging that other employees who had engaged in conduct of "comparable seriousness" received more lenient treatment. The court held that to be similarly situated, individuals with whom the Plaintiff seeks comparison must have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employment action taken. *Id.* at 583.

In the present case, no such evidence was presented by the Plaintiff. Avalos contended that three non-Mexican-American officers, Dave Arche, J.J. Carroll and Todd Taylor, were involved in comparable misconduct, but were not disciplined as severely. None of these officers was engaged in nearly identical conduct. According to the evidence, Deputy Dave Archie and the Plaintiff were involved in a mistaken identity arrest on a valid warrant. Both Archie and the Plaintiff participated in the arrest, and neither Archie nor Avalos was disciplined. See Cross Examination of Manual Avalos, Jr., pg. 17, 18, and 19. There was no evidence of insubordination, and no evidence of a cover-up or misrepresentation of the facts as in the case of the Plaintiff's arrest of Frederick Pray.

J.J. Carroll, a road patrol deputy, assisted in a warrantless arrest for disorderly conduct. Grady Pruette was arrested by Carroll and another deputy when Pruette

became belligerent during a landlord-tenant dispute to which the deputies responded. There was no arrest on a voided warrant, no insubordination, no cover-up by the deputies, and no misrepresentation of the truth. Furthermore, Carroll was not supervised by Susan Riley, Kevin Nelson, or Kim Cherney, who supervised the Plaintiff.

Finally, fugitive warrants deputies Todd Taylor and Rene Figueroa, were the subject of an excessive use of force complaint by Clara Parker. Both Taylor and Figueroa came to her house on December 18, 1990, looking for her husband, Melvin Parker, who was the subject of an outstanding arrest warrant. When Taylor saw someone inside the home who looked like the suspect, he asked Ms. Parker if he could come in. When Ms. Parker declined, Taylor entered the house. Although Ms. Parker (and the Plaintiff) claimed that there was excessive force used, Deputy Figueroa testified that there was no excessive force and no violation of any policy. Both deputies entered the house lawfully, pursuant to their arrest warrant.[1] Again, there was no false arrest pursuant to a canceled warrant, no insubordination, no falsification of a document, and no misrepresentation of the truth under oath. To the contrary, Figueroa testified that he and Taylor had done nothing wrong.

It is readily apparent that none of these incidents is "nearly identical" to the Plaintiff's arrest of Frederick Pray and his subsequent efforts to conceal the matter or misrepresent the truth of what occurred. Title VII "does not require, nor could have it ever realistically required,

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[1] § 901.19(1), Fla. Stat.

employers to treat all of their employees all of the time, in all matters with absolute hindsight equally". *EEOC v. Flasher Co., Inc.*, 986 F.2d 1312, 1319 (10th Cir. 1992).

While Plaintiff may complain that there was differential treatment, individualized circumstances concerning infractions may offer some mitigation for infractions which are less severely punished. *Flasher*, 986 F.2d at 1320. Under Title VII, the defendant is not required to prove why differential treatment occurred. It is up to the Plaintiff to prove why it occurred, and to prove that it was caused by intentional discrimination against a protected class. *Id.*

This causal connection is obviously missing. The Plaintiff has not only failed to show that he was similarly situated to other employees, he has also failed to establish that there is a link between any differential treatment and his protected status. For this reason also, no prima facie case was established. *See Martinez v. U.S. Sugar Corp.*, 880 F.Supp 773 (M.D. Fla. 1995); *Ebeh, supra.*

Even assuming that a prima facie case exists, the Defendant clearly articulated a legitimate, non-discriminatory action for the employment action taken against the Plaintiff.

The Defendant was required to prove only that Sheriff Hunter "honestly believed that the employee committed the violation". *Chaney v. Southern Railway Co.*, 847 F.2d 718, 723-24 (11th Cir. 1988); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989). Defendants burden of producing a legitimate, non-discriminatory reason is exceedingly light. *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1495 (11th Cir. 1989).

If there is any question regarding the existence of a legitimate non-discriminatory reason, this Court need only review Plaintiff's testimony on cross-examination. The Plaintiff admitted that he was given special training to use the computer in order to verify arrest warrants. He admitted disobeying the order on May 31, 1993, when he arrested Frederick Pray. (Cross examination at page 2). He failed to advise his supervisor of the false arrest (*Id.* at 4, 5). He conceded that he did not contact the records personnel before arresting Pray, although he so represented in his memorandum to the clerk of the court. (*Id.* at 5). The internal affairs investigation, Defendant's Exhibit "3", documents this misconduct, as well as Plaintiff's false testimony regarding the order by Kevin Nelson to check the computer and his alleged communication with dispatch to validate the warrant. (Defendant's Exhibit "3", Sworn Statement of Manual [sic] Avalos, p. 2, 6).

Furthermore, it is undisputed that Sheriff Hunter relied upon the internal affairs investigation in his decision to discipline Avalos. The Plaintiff's subjective belief that he did not engage in any misconduct is not enough in the face of this evidence to defeat the Defendant's legitimate, non-discriminatory basis for the employment action taken. *Jones*, 874 F.2d at 1540.

Pretext

According to Plaintiff's theory of the case, Susan Riley orchestrated the disciplinary action, fitness for duty referral and transfer to the road, because she attempted to have him transferred or terminated on December 10,

1992, and was unsuccessful. However, there is no evidence that the stated reasons for Avalos' discipline following the Pray incident were pretextual due to his national origin, or that the Defendant intentionally discriminated against him due to his national origin.

Rather, according to the evidence, his immediate supervisor, Sgt. Kevin Nelson, initiated the supervisory inquiry which led to the internal affairs investigation and Avalos' discipline. Nelson, as Plaintiff's immediate supervisor, was concerned with not only Plaintiff's arrest on a canceled warrant, but also Avalos' concealment of his arrest and misrepresentation of the truth in the document Avalos prepared for the clerk of the court. When Nelson, who coincidentally is married to a Mexican-American, presented his findings to his supervisor, Susan Riley, he recommended that the Plaintiff be transferred because he could no longer trust Avalos. Avalos, at the time of the arrest, was assigned to Immokalee, 40 miles distant from Naples, where Nelson was stationed. Nelson believed that Avalos needed close supervision, which he would receive if he was reassigned to road patrol.

There is no evidence that Susan Riley disciplined the Plaintiff following the internal affairs investigation. Rather, Hunter, concurring with the Under sheriff's recommendations, approved the decision to suspend Avalos for five days, transfer him to the road, impose a probationary period, and require a fitness for duty examination.

"In some cases, the defendant's evidence of a legitimate, non-discriminatory reason for its actions may be so strong as to rebut completely the inference raised by the

plaintiff's prima facie case". *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). Such is the case here. Even if Plaintiff asserted a prima facie case, he cold not rest on his case in the face of "powerful justification evidence offered by the defendant." *Id.*

The only suggestion of discrimination in this case is Plaintiff's conclusory allegations that he was the victim of discrimination. Plaintiff cannot point to any evidence of discrimination except his belief that he made "an honest mistake" and that the employment action taken against him was too severe. Plaintiff's conclusory allegations of discrimination, without more, 'are not sufficient to raise an inference of pretext or intentional discrimination where the [defendant] has offered such extensive evidence of legitimate, non-discriminatory reasons for his actions.' *Grigsby*, at 597.

It was the Plaintiff's burden to present concrete evidence in the form of specific facts to show why the stated reasons for his discipline were pretextual. *Early v. Champion International Corp.*, 907 F.2d 1077 (11th Cir. 1990). Plaintiff's ultimate burden was to prove intentional discrimination. *Harris*, 10 Fla.L.Weekly Fed. at C540. The Plaintiff failed to meet this burden, and the Defendant's motion for judgment as a matter of law should be granted on this issue.

CONSTRUCTIVE DISCHARGE

An employer has constructively discharged an employee under Title VII when the employee involuntarily resigns in order to escape intolerable and illegal employment requirements to which he is subjected

because of race, color, religion, sex or national origin. *Steel v. Offshore Shipbuilding*, 867 F.2d 1311 (11th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897, 907 (11th Cir. 1982). The Eleventh Circuit has traditionally required a high degree of deterioration in an employee's working conditions before finding a constructive discharge. *Hill v. Winn Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991); *Wardwell v. School Board of Palm Beach County, Florida*, 786 F.2d 1554, 1558 (11th Cir. 1986).

At the outset, it should be noted that the Court granted Defendant's Rule 50 motion with respect to Plaintiff's claim of a hostile work environment. Without a hostile work environment, the Plaintiff does not have an evidentiary foundation to support a claim of constructive discharge. Compare *Vance v. Southern Bell Telephone & Telegraph Co.*, 836 F.2d 1503 (11th Cir. 1989), *rev'd on other grounds Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Thus, as a matter of law, this Court should conclude that a reasonable jury could not find for the Plaintiff on his constructive discharge claim.

Furthermore, if there is any question regarding the sufficiency of the evidence, the Plaintiff's testimony before this Court is the best evidence of the inadequacy of his constructive discharge claim. The Plaintiff was reassigned to road patrol in Immokalee, his home town where he preferred to work. (Cross examination, p. 14). He was approached by his prospective supervisor, Lt. Kipp, with whom he had a good working relationship. Kipp offered him a shift of his choice and a newer car if he came to Immokalee. Kipp wanted him on the shift, and encouraged him not to quit. In fact, Kipp came to Plaintiff's house and told him that he valued the Plaintiff's

heritage as a Mexican-American and his bilingual abilities. Kipp did not want him to quit, and Avalos believed him. (Cross examination), p. 9, 10).

In contrast, Plaintiff offered only his perception that he had failed as a warrants officer and would be unable to function as a road officer in support of his decision to resign. A reasonable jury could not find that Plaintiff was subjected to intolerable working conditions which compelled him to resign, and this Court should enter judgment as a matter of law on Plaintiff's claim of constructive discharge.

DAMAGES

Plaintiff's damages award is necessarily based on a finding of constructive discharge by the jury. Certainly, without a finding of constructive discharge, Plaintiff is not entitled to an award of back pay or future pay. *See Hill*, 734 F.2d at 1528; *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277, 1280 (11th Cir. 1992); *Walther v. Lone Star Gas Co.*, 59 FEP Cases 848, 854; *Wilson v. S&L Acquisition Co.*, 56 FEP Cases 1233, 1240 (11th Cir. 1991). Because the evidence does not as a matter of law support a finding of constructive discharge, the damage awards of $120,000.00 for back pay, and $100,000.00 for front pay, must necessarily be vacated.

Furthermore, the jury's award of $100,000.00 for mental anguish is also unsupported by the evidence, even if the Court finds liability for disparate treatment. The Plaintiff's evidence of emotional distress, such as Dr. Snelling's deposition testimony, centers on the marital and financial stress which followed his resignation from

the Sheriff's Office. This evidence was offered by the Plaintiff as a consequence of his allegedly involuntary resignation. Because the constructive discharge claim fails, these damages necessarily fail as well.

It should also be noted that the Plaintiff failed to put on any evidence concerning his monetary loss as a result of his suspension. There is no evidentiary basis which would support a damages award to compensate him for his suspension. Thus, assuming that the constructive discharge claim is without foundation, there is no factual basis to support a claim for back pay for the five days suspension which was imposed by the Sheriff. Indeed Plaintiff testified that he was on vacation at the time he left. Plaintiff never testified that he was actually out-of-pocket five days pay as a result of the suspension. Thus, the Defendant is entitled to judgment as a matter of law with regard to the damages, which should be vacated due to the lack of evidentiary support. In the alternative, Rule 50(b) gives this Court the discretion to grant a new trial due to the insufficient proof of damages. *Network Publications, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212 (11th Cir. 1992); *Gossard v. Adia Services, Inc.*, 922 F.Supp. 558, 563 (M.D. Fla. 1996).

Furthermore, the Defendant is entitled to a complete defense to Plaintiff's section 1983 discrimination claim, and to a limited defense under 42 U.S.C. § 2000e-5(g)(2)(B) because the record in this case establishes that the Plaintiff would have been disciplined in any event regardless of his protected status as a Mexican-American. In *Harris*, the Eleventh Circuit addressed race discrimination claims under Title VII and 42 U.S.C. § 1983. The court held that the defendants were entitled to summary judgment on

the § 1983 claim regarding their affirmative defense that the plaintiff would not have been hired by the defendant even in the absence of discriminatory intent. 10 Fla.L.Weekly Fed. at C541. The court further held that under 42 U.S.C. § 2000e-5(g)(2)(B), assuming that discrimination was one motivating factor, the court could grant declaratory relief of attorney's fees and costs, but was precluded from awarding damages or issuing an order requiring reinstatement if the defendant proved it would have made the same employment decision regardless of the plaintiff's race. *Id.*

Due to the record in this case, it is abundantly clear that regardless of Plaintiff's status as a Mexican-American, the defendant would have taken the same employment action due to Plaintiff's clear and unequivocal misconduct. Accordingly, even if this Court finds that the Defendant is liable for disparate treatment, the damage award should be vacated and any relief to which the Plaintiff is entitled should be limited to declaratory or injunctive relief, with the exception of reinstatement. *See Harris*, at C541.

CONCLUSION

Based on the record in this case, and the authorities cited above, the Defendant is entitled to judgment as a matter of law. In the alternative, the Defendant submits that a new trial should be awarded if the Court decides

not to enter judgment as a matter of law. Respectfully submitted this 24th day of December, 1995.

/s/ R.W. Evans
R.W. EVANS, ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ISIDRO M. GARCIA, ESQUIRE, 105 South Narcissus Avenue, Suite 802, West Palm Beach, Florida 33401 this 24th day of December, 1996.

/s/ R.W. Evans
R.W. EVANS, ESQUIRE